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Supreme Court, U.S.
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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, 1992

JOHN W. MCGOWAN,

PETITIONER,

VS.

MISSISSIPPI STATE OIL & GAS BOARD,

RESPONDENT,

**PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF THE
STATE OF MISSISSIPPI**

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==========

QUESTIONS PRESENTED

A state court of last resort has limited its judicial review of administrative agency action by applying the "substantial evidence rule", where the agency both advocated a position contrary to that of Petitioner, and adjudicated the controversy as well (as in Withrow v. Larkin, 421 U.S. 35). Does application of the substantial evidence rule in the Withrow fact situation - where the agency is both party litigant and judge - violate a citizen's right to due process, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States? This is an important question of federal law which has not been, but should be settled by this Court, as contemplated by Rule 10(1)(c) of this Court.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case.

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IN THE SUPREME COURT OF THE UNITED STATES
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JOHN W. McGOWAN PETITIONER

VS. NO. _____

MISSISSIPPI STATE OIL & GAS BOARD RESPONDENT

PETITION FOR WRIT OF CERTIORARI
OPINIONS AND ORDERS BELOW

Petitioner seeks review of the opinion and Order of the Supreme Court of the State of Mississippi in Cause No. 59604 (App. 1). As of the date of this writing, the case had not been printed in the official reporter.

STATEMENTS OF JURISDICTIONAL GROUNDS

1. The Supreme Court of Mississippi decided cause number 07-CA-59604, John W. McGowan vs. Mississippi State Oil & Gas Board, on June 24, 1992.

2. The Supreme Court of Mississippi denied John W. McGowan's Petition For Rehearing on August 12, 1992.

3. Jurisdiction is conferred on this

Court by 28 U.S.C. 1257(a). The Petition is timely filed (U.S. Supreme Court Rule 13).

CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS INVOLVED IN THIS CASE

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall .... be deprived of life, liberty, or property, without due process of law;

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

This case involves a long and bitter controversy between John W. McGowan and the Mississippi State Oil & Gas Board regarding the design of wells which dispose - by subsurface injection - of salt water

produced in conjunction with oil. The Board has adopted the traditional position that such wells must be equipped with a device known as a packer, in order to better protect underground sources of drinking water. A packer fills the void (or annular space) between the exterior pipe (casing) and the interior pipe (tubing), preventing salt water from standing in that annular space above the depth at which the packer is set.

As producing oil wells approach the end of their economic life, they begin to make increasingly greater percentages of salt water, and increasingly smaller percentages of oil. It is primarily the increasing cost of disposing of this water - in relation to decreasing revenue from the sale of oil - which eventually causes oil wells in this country to be abandoned. McGowan has designed a "packerless" salt water disposal well which allows him to

dispose of huge volumes of salt water efficiently, and hence, more economically. This design has allowed McGowan to purchase and economically operate hundreds of producing oil wells in four states which would otherwise be abandoned. These wells provide a source of employment for hundreds of people. More significantly, this technology offers hope to a declining oil industry in this country. This case will significantly impact the oil and gas industry. McGowan maintains that "packerless" salt water technology - in addition to benefiting the industry - protects the environment to a greater extent than does the traditional salt water disposal well completion.

The relationship between John W. McGowan and the Mississippi State Oil & Gas Board is not unlike that which existed between France and England during that historical period known as the "Thirty

Years War". While there has not been a continuous battle, neither has there been a state of peace for any appreciable length of time. By way of only brief example, McGowan successfully attacked the constitutionality of the Board's environmental rule a decade ago. A number of "skirmishes" followed - penal actions initiated against McGowan by the Board - all successfully defended by McGowan on appeal to the judiciary. In one such skirmish in 1985, the Board fined McGowan $20,000.00. McGowan argued to the Circuit Court on appeal that the Board Supervisor had perjured himself. (The same man served as Supervisor throughout these proceedings.) The Circuit Judge in reversing the Board and vacating the fine, chastised the Board for acting in an arbitrary and capricious fashion. These now famous battles have been the subject of considerable press, much of it critical of

the Board. All or most of these facts lie outside of the record in this case (a fact which is significant to the argument we advance at a later point); the hostility which existed between these parties is evident to only a limited extent from the record.

In 1984, the Board authorized McGowan to operate all of his salt water disposal wells without a packer, as exceptions to the Board's general rule. In January, 1987, McGowan applied for two such packerless permits. The application was heard unopposed at the January meeting. The Board inexplicably took the matter "under advisement" and continued the same until the February, 1987 meeting. On January 26, 1987, the Board suddenly ordered McGowan to appear before that body at its February meeting and show cause why he should not be fined, and/or why three packerless permits should not be revoked.

Prior to the February, 1987 meeting, this attorney learned we would be surprised with expert testimony in opposition to the packerless concept. We requested disclosure of that expert proof on this complex technical issue, that we might avoid "surprise", and be afforded a fair opportunity to refute the same. The Board refused. (McGowan thereafter instituted a satellite discovery proceeding in Chancery Court against the Board, to no avail.) (App. 108)

In the proceedings before the Board that followed, McGowan formally moved for discovery; and the Motion was denied. The Board refused to exclude witnesses, to which ruling McGowan made timely objection. (The Board's initial expert witness performed so poorly that it hired another, who observed McGowan's case in rebuttal; then testified over McGowan's objection - all, once again - without the benefit of

any discovery regarding such expert's opinions!) The Board admitted into evidence over McGowan's objections numerous letters from major oil companies solicited by the Board, which letters purported to give expert opinions on the issue of packerless technology, in violation of the hearsay rule. McGowan, of course, did not have the opportunity to cross-examine these alleged experts. Perhaps most significantly, the Board quashed subpoenas issued by McGowan to Board members, and refused to allow McGowan to question those Board members on the issue of bias.

Not surprisingly, the Board denied McGowan's applications for additional packerless completions; revoked several existing packerless permits; and even fined McGowan $20,000.00 for operating one such permitted well prior to a hearing in Circuit Court on McGowan's Motion For Stay (App. 70).

McGowan appealed the Board's ruling to the Circuit Court of Hinds County, Mississippi. The law in the State of Mississippi provides that an administrative ruling may be disturbed on appeal only if it: (1) (N/A) (2) violates a constitutional right of the complaining party; (3) is arbitrary or capricious; or (4) is not supported by substantial evidence (Wright v. State Oil & Gas Board, 532 So.2d 567, 570 (Miss. 1988) and others). McGowan argued to the Circuit Court that he was denied fundamental due process guaranteed by both the Mississippi and the United States Constitutions, by reason of the specific procedural rulings discussed hereinabove; and more fundamentally, by reason of the fact that the Board both advocated a position contrary to that of McGowan, and adjudicated the proceeding. McGowan also argued that the Board's ruling was contrary to the overwhelming weight of

the evidence. (These grounds are necessarily intertwined with the proposition that the Board ruling was, for the same reasons, arbitrary and capricious.) These questions were presented to the Circuit Court by Assignment of Errors (App. 103).

The Circuit Court vacated the fine imposed by the Board, and vacated the Board orders revoking McGowan's existing packerless permits, finding that such orders were arbitrary and capricious. But the Court affirmed the Board's rejection of McGowan's applications for additional packerless permits (App. 80). The Circuit Court ruled that : (1) Per Withrow v. Larkin, 421 U.S. 35, 43 L.Ed. 712, 95 S.Ct. 1456 (1975) (specifically citing that case), the combinations of investigatory and adjudicatory functions within a single agency is not a denial of constitutional due process, per se; and the facts and

circumstances in the record of this case are not indicative of sufficient bias or prejudice on the part of the Board to justify exception to the general rule, as laid down in Withrow; (2) the specific procedural rulings complained of do not, considered individually or together, represent a deprivation of constitutional due process; and (3) as to the orders affirmed, the Court would not inquire into the weight of the evidence on the technical issue of packerless completions, inasmuch as the rulings of the Board were supported by substantial evidence (App. 53). McGowan's Motion to Reconsider was denied (App. 82).

McGowan appealed to the Mississippi Supreme Court. McGowan argued once again (Statement of Issues, App. 102), that both the procedural rulings specifically, and the fact that he was tried and judged by his adversary generally, violated his

constitutional right to due process. He also presented to the Mississippi Supreme Court a more specific and well-defined question, which we now present to this Court by this Petition: Should a Court limit judicial review of agency action by applying the "substantial evidence rule", in the "Withrow" situation, where the agency both advocates a position contrary to that of a citizen, and adjudicates the controversy as well? So far as we have been able to determine, this question has never been addressed by the Mississippi Supreme Court, nor by this Court or any other.

The Mississippi Supreme Court decided this case on June 24, 1992. It held (App. 1) that McGowan was not deprived of constitutional due process by reason of either the specific procedural rulings complained of, nor the procedural format itself - where the Board both advocated a

position and adjudicated the controversy. On the issue of the substantial evidence rule, the Court held that under such authority the Board must do more than simply rule, then argue on appeal that the record contained evidence supportive of such ruling. The Court held that it was incumbent upon an agency to specify the evidence which it relied upon in making its decision, so that the Mississippi Supreme Court could determine whether the same was "substantial". To that end, the case was remanded to the Board.

McGowan filed a timely Petition For Rehearing on July 7, 1992 (App. 87). The Mississippi Supreme Court implicitly ruled that the substantial evidence rule has application in the "Withrow" situation. We asked that Court in our Petition For Rehearing to make a specific, rather than implicit ruling on the question, so that we might better present the same to this

Court; and we asked that the Court reconsider such ruling, presenting one last time the question raised by this Petition. The Petition For Rehearing was denied on August 12, 1992; no opinion was written (App. 85).

ARGUMENT

We would digress for a moment to observe that both the Circuit Court and the Mississippi Supreme Court characterized each of the procedural rulings McGowan complains of as "fundamentally unfair"; yet declined to find that McGowan on the whole was thereby deprived of constitutionally guaranteed due process. We are unable to harmonize those two conclusions.

There is no question but that the Constitutional guaranty of due process of law applies to, and must be observed in, administrative as well as judicial proceedings. Morgan v. U.S., 304 U.S. 1, 18, 19; 82 L.Ed. 1129, 58 S.Ct. 773 (1938);

Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123, 161; 95 L.Ed. 817, 71 S.Ct. 624 (1951). There is considerable question as to what constitutes due process in the administrative forum. Still, the authors of opinions relevant to this question invariably utilize the same phrase - "fair play".

> Hannah v. Larche, 363 U.S. 420, 442; 4 L.Ed.2d. 1307, 80 S.Ct. 1502 (1960) (emphasis added) Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play.
>
> Morgan v. U.S., supra (emphasis added) Congress, in requiring a "full hearing" had regard to judicial standards - not in any technical sense but with respect to those fundamental requirements of fairness, which are of the essence of due process in a proceeding of a judicial nature.
>
> But a "full hearing" - a fair and open hearing - requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity;

> otherwise the right may be but a barren one. Those who are brought into contest with Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

The Morgan Court could have been addressing the obstinate refusal of this agency to allow discovery when it said:

> The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play.
>
> Joint Anti-Fascist Refugee Committee v. McGrath, supra (emphasis added) Fairness of procedure is due process in the primary sense.

If due process is fundamental "fairness"; and if each of the rulings complained of was found to be fundamentally

unfair; how, we wonder, can the proceeding as a whole not be violative of due process? But we must emphasize that we are not asking this Court to find that the procedural rulings themselves deprived Petitioner of due process - if the Court would go no further. Such a ruling would only avoid the real issue - whether Withrow has been unreasonably expanded by its marriage to the substantial evidence rule.

This proceeding is a judicial aberration. The Board hired attorneys and expert witnesses to oppose McGowan. The Board actually met with its Supervisor, its staff, its attorneys and expert witnesses - each morning before the proceedings commenced - and planned strategy. The Board members thereafter donned their robes and sat in judgment over that very proceeding. It is simply unconscionable. The situation was identical to that in Morgan v. U.S., supra, P. 20, where this

Court observed:

> The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to mere form of the proceeding and ignores realities. In all substantial respects, the government was proceeding against the owners. The proceeding has all the essential elements of contested litigation, with the government and its counsel on the one side and the Appellants and their counsel on the other. It is idle to say that this was not a proceeding in reality against the Appellants when the very existence of their agencies was put in jeopardy.

Justice Robertson (who himself quoted Morgan) noted that the most offensive of these facts are not entirely apparent from the record. Moreover, he found the issue to be moot, since the Board's attorney - as well as his own "independent investigation" indicated that this kind of thing doesn't go on anymore (App. 37). Unbelievable!

Withrow is entirely dependent upon its proposition that one may advocate one position without necessarily being biased

against the contrary position. We submit that this proposition is both naive and abstract, ignoring the realities human emotion. We submit that Withrow sacrifices our most fundamental legal right - the right to trial before an impartial tribunal - on the altar of practical necessity. The judiciary is not able - or not willing - to hear administrative cases, which now comprise the greater part of litigation in this country. We are not here, however, seeking reversal of Withrow, though nothing would please us more.

Withrow acknowledged an exception to the rule it established. The agency will not be allowed to both advocate and adjudicate, where the "special facts and circumstances present in the case (indicate) that the risk of unfairness is intolerably high" (p. 47) This case probably falls within that exception. The Circuit Court and the Mississippi Supreme

Court simply did not grasp the true nature of this proceeding, and did not understand the extent of the animosity which existed between these parties. Those Courts could not have understood; and this Court cannot; because (as we previously observed) most of the facts necessary to an understanding of such matters lie outside of the record; but that will almost always be the case. Such matters will not be apparent from the record in very many cases. Moreover, the exception fashioned by Withrow is predicated upon a subjective test. The advocacy/bias distinction is incredibly thin. What appears to be an "intolerably high risk of unfairness" to one Appellate Judge (Justice Stewart, for example, in the Hortonville case) may not appear so to another. (Hortonville Joint School District No. 1 et al v. Hortonville Educational Association, 426 U.S. 482, 490; 49 L.Ed. 2d 1, 96 S.Ct. 2308 (1976).

The point of all this is simply that if one accepts Withrow, one must accept the fact that in some cases where the agency is far too involved - and has absolutely no business trying its own case - the judiciary will fail to recognize the danger and fail to make exception to the Withrow rule. Surely this Court must have known when it laid down the rule - and the exception - in Withrow, that some cases would slip through the cracks. Undoubtedly, it considered that unfortunate result to be the lesser of two evils - the greater evil being the flood of cases which would be visited upon the judiciary but for the Withrow rule. But if this Court finds only that McGowan v. State Oil & Gas Board slipped through the cracks, such a limited ruling would leave unanswered the more critical question presented by this case. The only "safety net" beneath the cases which slip through Withrow is the right of

appeal to an impartial judiciary. If the agency was biased, (once again, we submit that one's adversary is always bias, and to believe otherwise is naive) the administrative litigant may have his case reviewed by an unbiased judiciary. By marrying Withrow to the substantial evidence rule, the Mississippi Supreme Court has removed the safety net. That is what this case is all about.

The substantial evidence rule was also born at the alter of practical necessity - the product of an overburdened judiciary. It "limits" judicial review by prohibiting the judiciary from reviewing the record for the purpose of determining whether the agency ruling is supported by the weight of the evidence (i.e. Cook v. Heckler, 750 F.2d 391 (5th Cir. 1985)). It is generally recognized that agency rulings are subjected on review to an entirely different and much more relaxed evidentiary

test. The agency findings of fact - theoretically the product of peculiar agency expertise - are afforded a presumption of prima facie correctness, and will not be disturbed on appeal if there is "any substantial basis" in evidence for such findings. (Cobb Bros. Const. Co. v. Gulf, M & O R. Co., 213 Miss. 706; 57 So.2d 570 (1952); Barnwell, Inc. v. Sun Oil Co., 249, Miss. 398, 162 So.2d 635, 640 (1964); Miss. Public Service Comm. v. Columbus and Greenville Ry. Co., 573 So.2d 1343, 1346 (Miss. 1990)),

> It is not the function of the circuit court on appeal from an administrative agency to determine whether the action of the agency is right or wrong, correct or incorrect, wise or unwise, advisable or best fitted to the situation involved. If there is substantial evidence to sustain the legal action of the legislative agency, the court will not substitute its judgment for that of the agency. (County Bd. of Ed. v. Parents and Custodians of Students, 251 Miss. 195, 168 So.2d 814, 819 (1964))

This incredibly lax rule - which prohibits the judiciary from weighing the evidence - necessarily presumes that the agency - with its peculiar expertise - weighed the evidence.

The Mississippi Supreme Court held (per Withrow) that the Board could oppose McGowan, and adjudicate the controversy as well, without violating due process per se. While we strongly disagree with the Withrow result, the next step concerns us even more. The Circuit Court declined to review the proof for the reason that the Board's ruling was - in that Court's estimation - supported by substantial evidence. The Mississippi Supreme Court apparently concurred in principle, but remanded the case so that the Board could specify what evidence it (the Board) felt was substantial. There are two problems with this marriage of principles (Withrow and the substantial evidence rule) - one

technical; one more fundamental. First of all, if the agency is both litigant and judge, the agency - in its capacity as judge - can literally control the "substantiality" of the evidence in its own favor through evidentiary rulings. It may exclude much of its adversary's evidence; and allow evidence in support of this own position (as it did in this case) which is ordinarily inadmissable. More fundamentally, every single case cited by Justice Robertson on the substantial evidence rule (in fact, every case - whether cited by Judge Robertson or not) involved two litigants competing before an impartial Oil & Gas Board. Wright v. State Oil & Gas Board, 532 So.2d 567, 570 (Miss. 1988); Transcontinental Gas Pipeline Co. v. State Oil & Gas Board, 457 So.2d 1298, 1312 (Miss. 1984), rev'd on other grounds, 474 U.S. 409, 106 S.Ct. 709, 88 L.Ed. 2d 732 (1986); Damson Oil Co. v. Southeastern Oil

Co., 370 So.2d 225, 229 (Miss. 1979); State Oil & Gas Board v. Crane, 271 So.2d 84 (Miss. 1972); Masonite Corp. v. State Oil & Gas Board, 240 So.2d 446, 448 (Miss. 1970); Superior Oil Co. v. State Oil & Gas Board, 220 So.2d 602, 603 (Miss. 1969); California Co. v. State Oil & Gas Board, 200 Miss. 824, 842, 27 So.2d 542, 546 (1946). (See also Ohio Oil Co. v. Porter, 225 Miss. 55, 82 So.2d 636, 638 (1955); Barnwell, Inc. v. Sun Oil Co., supra)) All of the cases applying the substantial evidence rule to the rulings of any agency involve two litigants competing before an impartial agency. It is not totally unreasonable to presume that the agency, in that situation, fairly and impartially weighed the evidence. It is not quite so outrageous for the judiciary in that situation to refuse to weigh the evidence, for the reason that the agency has already done so. But aside from the Withrow

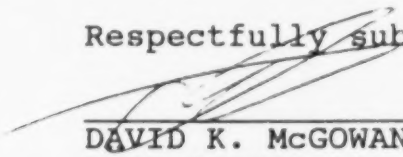
question (whether such proceedings violate due process per se) is it logical to presume - on appeal from Withrow type proceedings - that one's adversary fairly and impartially weighed the evidence? As the attorney for the Board said, "The Board reached their conclusion on the matter when they decided that they to should oppose packerless wells" (App. 101). Having already decided the issue before the hearing began, and having hired lawyers and experts to urge a position in opposition to McGowan, is it logical to believe that this Board sat down at the conclusion of the proof and reasoned, "Okay, let's review all of this evidence and determine whether McGowan proved his case by a preponderance of the evidence"?

The judiciary may decline to review an agency's resolution of a dispute between competing litigants under the substantial evidence rule. And the agency may be

allowed to adjudicate a controversy to which it is a party (though this writer personally will never be able to accept that premise). But the two concepts cannot be married. If an agency is itself a litigant, it cannot be afforded the presumption that it fairly weighed the evidence in the case in which it had a stake. The judiciary must in such instance review the record to assure that the agency ruling conforms to the proof. The bottom line is this. If the evidence is not impartially weighed by the agency - because it is itself a party to the controversy; and if it is not reviewed by an impartial judiciary because of the substantial evidence rule; then the evidence will never

be impartially weighed by anyone. How can that result afford due process?

Respectfully submitted,



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IN THE SUPREME COURT OF MISSISSIPPI
NO. 07-CA-59604

JOHN W. McGOWAN

v.

MISSISSIPPI STATE OIL & GAS BOARD

BEFORE ROY NOBLE LEE, C.J., ROBERTSON AND McRAE, JJ.
ROBERTSON, JUSTICE, FOR THE COURT:

I.

Today's appellant challenges the State Oil and Gas Board's denial of permission that he operate salt water disposal wells without a device known as a packer. En route he presents fundamental questions of law and policy in our regulatory state. We consider these with care for at their core they challenge the efficacy of what we have known for near half a century.

We find in the end the Board has been charged by law to enforce two competing public policies--the prevention of waste and the control of environmental hazards. The Board has not favored us with minimally

adequate findings on these points, much less an explanation how it has evaluated and balanced the competing interests and decided which should rule the day.

We vacate and remand.

II.

John W. McGowan ("McGowan") is in the oil business. Like others, he has, over the years, struggled with the problem of salt water disposal. The Mississippi State Oil & Gas Board ("the Board") has taken the position that salt water disposal wells must be equipped with a packer, ostensibly to better protect underground sources of drinking water ("USDW"). McGowan's wells contain no packer, and he has of late sought regulatory approval of his "packerless" engineering design and methodology for disposal by subsurface injection.

As McGowan sees it, producing oil wells over time yield increasingly greater

percentages of salt water and increasingly smaller percentages of oil, and this progression becomes geometrically pronounced as the well approaches the end of its economic life. In his view, the increasing cost of disposing of this salt water vis-a-vis the decreasing oil revenues eventually causes wells to be abandoned. McGowan's "packerless" salt water disposal design allows him to dispose of huge volumes of salt water more economically. Using this design, McGowan says he has purchased and now operates 130 producing wells in four states--wells which, in his view, would otherwise have had to be abandoned. He sees the benefits of his design as substantial production we would otherwise do without, considerable revenue for thousands of working interest and royalty owners, as well as the state through severance taxes. He argues the continued lives of these wells provide a

source of employment for hundreds of people. More globally, McGowan trumpets a technology offering hope for a declining industry.

In 1984, McGowan obtained from the Board provisional permits to operate several of his salt water disposal wells without a packer.[1] In December of 1986, he applied for a new permit for two such wells in the Heidelberg Field in Jasper County, again with packerless exceptions, citing his record under the 1984 permits. He presented his case at the Board's regular January, 1987, meeting. Before acting on the application, the Board, on January 26, 1987, ordered McGowan to appear at its February meeting to show cause why

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[1] At the time the Board's Statewide Rule 63, *Underground Injection Control*, preferred use of a packer but provided the Board could authorize packerless exceptions upon application, notice, hearing and proper showing.

the packerless permits for three other salt water disposal wells should not be revoked or modified. See Miss. Code Ann. § 25-43-13 (Supp. 1990). During the course of the hearings that followed, McGowan filed new applications for packerless permits in the Cranfield and LaGrange Fields in Adams County, proposed conforming amendments to his existing permits, and asked that packerless completions be authorized under the then-pending amendments to Statewide Rule 63. All of these matters were ultimately consolidated and heard by the Board over a period of several months.

At the hearings, McGowan offered extensive proof regarding the productivity and efficiency and safety of his packerless design, and, as well, his air pressure testing methodology. Witnesses in opposition--produced by Board staff, rather than third parties--addressed environmental

concerns only. These witnesses did not concede the superiority of McGowan's design, but questioned primarily the Board's ability to test McGowan's wells and monitor environmental safety.

In the end, the Board entered a series of orders rejecting McGowan's packerless processes. On July 22, 1987, the Board acted as follows:

(a) Order No. 279-87, denied "by majority vote" McGowan's Petition for Authority to Recomplete, Work Over and Operate the Mrs. L.H. Eddy Heidelberg No. 1 Well for Salt Water Disposal.

(b) Order No. 280-87, denied "by majority vote" McGowan's Petition for Authority to Recomplete, Work Over and Operate the Mrs. L.H. Eddy Estate No. 1 Well for Salt Water Disposal.

(c) Order No. 281-87, granted "by majority vote" the Board's Motion to Consider the Revocation, Modification or

Reissuing of Board Order No. 473-84 for the West Segment South Unit 1-14-2 Salt Water Disposal well in Tinsley Field, Yazoo County, Mississippi, "to require a packer to be placed in the referenced well...."

(d) Order No. 282-87, granted "by majority vote" the Board's Motion to Consider the Revocation, Modification or Reissuing of Board Order No. 616-84 for the Pickens Field--Yazoo County SWDW No. 1 Salt Water Disposal Well in Pickens Field, Yazoo County, Mississippi, "to require a packer to be placed in the referenced well...."

(e) Order No. 283-87, granted "by majority vote" the Board's Motion to Consider the Revocation, Modification or Reissuing of Board Order No. 617-84 for the Pickens Field--Madison County SWDW No. 1 Salt Water Disposal Well in Pickens Field, "to require a packer to be placed in the referenced well...."

(f) Order No. 284-87, denied "by

majority vote" McGowan's Petition for Authority to Work Over and Operate the Ella G. Lees SWDW No. 32 Well Without a Packer, Cranfield Field.

Then, on December 16, 1987, the Board entered these further orders:

(g) Order No. 511-87, denied McGowan's Petition for Authority to Amend Order No. 213-85, which authorized packerless injection with certain restrictions and requirements in O.L. Wilson No. 6 Well, LaGrange Field.

(h) Order No. 512-87, denied McGowan's Petition for Authority to Amend Order No. 230-85, which authorized packerless injection with certain restrictions and requirements in O.L. Wilson No. 2 Well, LaGrange Field.

(i) Order No. 513-87, denied "by majority vote" McGowan's Petition for Authority to Operate Without a Packer the O.L. Wilson No. 1 Well, LaGrange Field.

(j) Order No. 514-87, denied "by majority vote" McGowan's Petition for Authority to Operate Without a Packer the O.L. Wilson No. 8 Well, LaGrange Field.

McGowan timely sought judicial review of each of these orders (and others not technically before us in the present proceeding) in the Circuit Court for the First Judicial District of Hinds County, Mississippi, in matters designated by seven separate docket numbers, but ultimately consolidated for hearing. In due course, the Circuit Court considered McGowan's application and, noting the Board orders appealed from were made on three-to-two votes, held in the end it should

> accord to this agency a presumption of regularity and integrity and that [this] presumption has not been overcome by facts evident in this record. This Court is t h e r e f o r e duty-bound to adhere to the substantial evidence rule with regard to the central issue in these proceedings, whether the Board should permit further

packerless completions at this time.

The Circuit Court then denied McGowan's application with respect to each of the orders noted above, but stayed the effectiveness of its ruling pending appeal to this Court.

III.

McGowan challenges the institutional processes of the State Oil and Gas Board. His complaint is that the Board was both his adversary and his judge. He struggles mightily to convince us we should strike this familiar feature of the administrative landscape, on grounds it offends due process, the right to which is secured to him by Art. 3, § 14 of the Mississippi Constitution of 1890, and ultimately by the Fourteenth Amendment to the Constitution of the United States. McGowan argues the idea implicit in the substantial evidence rule, one familiar expression of limited judicial

review of agency action, is that an independent arbiter has found the facts and has applied the law.

We do not take the point lightly, for it is premised upon that ancient first principle of justice, that no man shall serve as judge of his own cause. Dr. Bonham's Case, 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (1610); In Re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942, 946 (1955). Beyond its natural appeal, we find the principle a part of our jurisprudence in a variety of contexts. See, e.g., Bell v. City of Bay St. Louis, 467 So.2d 657, 662 (Miss. 1985); Danner v. Mid-State Paving Co., 252 Miss. 776, 786, 173 So.2d 608, 613 (1965), quoted in Chisolm v. State, 529 So.2d 635, 640 (Miss. 1988).

A few basics. Administrative agencies are ambiguous creatures born of necessity, mired in the tension between public policy

and personal claims of right.[2] They pursue pragmatically the public interest balancing the utilitarian (and expertly divined) calculus of aggregate net benefit against the individual's claim to fair opportunity and process.[3] They address pressing questions of political economy and science where there are seldom easy answers and almost never only two points of view. Our administrators also regulate and facilitate individual enterprise without which the public interest will surely suffer.[4] Here, as well, "the life of the law has not been logic; it has been

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[2] *See e.g.*, C. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 48-71 (1990); A. C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, And The Rise of the Administrative Presidency*, 73 Cornell L. Rev. 1101 (1988).

[3] R. Posner, *Economic Analysis of Law* 572-74 (3d ed. 1986).

[4] S. Breyer, *Regulation and Its Reform* (1982).

experience."[5] And so we have shaped political structures that do not always resemble courts and committed to them processes not at all like the traditional adjudicatory process.[6]

McGowan's point is not new. See Dampier v. Lawrence County School District, 344 So.2d 130 (Miss. 1977). The leading

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[5] Holmes, *The Common Law* 1 (1881).

[6] Due to the specialized nature of many of their functions, it has long been accepted that as much as possible, courts of law should defer to the findings of administrative agencies. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) But this deference must always be handled with caution. R. Pierce, S. Shapiro & P. Verkuil, *Administrative Law and Process* ix (1985) ("Although the courts will defer to some extent in ...review functions, judicial review sets an outer limit beyond which agency discretion may not be exercised."). For an excellent discussion of many of the tensions which accompany the review of administrative agency decisions, *see generally*, C. Edley, *Administrative Law: Rethinking Judicial Control of Bureaucracy* 96-130 (1990). *See also* S. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986).

case is Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). In Withrow, the Supreme Court summarized:

> The case law, both federal and state, generally rejects the idea that the combination of judging and investigating functions is a denial of due process.

Withrow, 421 U.S. at 52. Withrow went on to caution vigilance, that this combination of investigative and adjudicative functions in practice may on occasion present the Court on judicial review a compelling case for

> determining from special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.

Withrow, 421 U.S. at 58. See also, Harrison County School Board v. Morreale, 538 So.2d 1196, 1201-02 (Miss. 1989).

The Withrow Court noted that the Federal Administrative Procedures Act

APA),[7] precludes employees of agencies from adjudicating matters which they have investigated or prosecuted, although the provision exempts "the agency or a member or members of the body comprising the agency." In recent years, this state's administrative boards and agencies have shown an increasing sensitivity to the need to keep apart, as much as may practicably be done, investigatory and advocacy and decision-making functions. Most familiar are the public school boards which, in teachers' rights cases, routinely appoint an impartial hearing officer. See Miss. Code Ann. § 37-9-111 (1972, as amended). Notwithstanding, we continue to accept, for example, that the Board that fired the teacher in the first place may

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[7] *Withrow*, 421 U.S. at 52. *See also* Administrative Procedure Act (APA), 5 U.S.C. §554(d)(1988); 2 K. Davis, *Administrative Law Treatise* §§13.06-13.07 (1958).

later sit in judgment on his or her administrative appeal. See Harrison County School Board v. Morreale, 538 So.2d at 1200-03, and cases cited therein.

The Oil and Gas Board's investigatory/advocacy/decision-making functions most certainly are performed under the same agency aegis, intertwined as well with the Board's policy-making and policy-implementing duties. Still, we are struck that, at least on paper today, the Board seems to keep appropriately separate these functions to a greater degree than is required by the APA. That act would allow some such functions to be combined in the same person under certain circumstances.[8] Under the Board's statutory framework, the five-member Oil & Gas Board sits as an

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[8] *See* Administrative Procedure Act (APA), 5 U.S.C. §706(2)(E) (1988); *see also* 2 K. Davis, *Administrative Law Treatise* §13.11 (1958).

entity with authority independent of that of the agency's supervisor and staff.[9] The Board members are present only for the hearings themselves. They deliberate and rule on the petitions brought before them in executive session. By law, each is charged to have and exercise independent judgment.[10]

McGowan insists back in 1987 certain Board members failed to respect their independence duties, and it appears on occasion this may have been so. McGowan's charges are pressed with verve and conviction, but in the end appear in substantial part outside the record and thus beyond our power of review. Besides, we are assured by counsel for the Board today greater safeguards insure the Board's

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[9] *See* Miss. Code Ann. §53-1-5(1)(1972 and Supp. 1991).

[10] *See* Miss. Code Ann. §53-1-5(3) (1972 and Supp. 1991).

independence from adversarial activities, a fact of consequence in view of the disposition we make below. Suffice it to say, we accept the Withrow premise that due process does place limits on the extent to which administrators may involve themselves in advocacy and decision-making vis-a-vis a regulated party.

IV.

A.

Against the backdrop of his institutional concerns, McGowan grudgingly concedes the limited scope of judicial review of the rulings of the State Oil and Gas Board. Assuming the overall process comports with the constitution, we have no authority to interfere unless one or more of the rulings at issue is (1) beyond the Board's legal power, (2) violates some constitutional right of the complaining party, (3) is arbitrary or capricious, or (4) is not supported by substantial

evidence. See, e.g., Wright v. State Oil & Gas Board, 532 So.2d 567, 570 (Miss. 1988); Transcontinental Gas Pipeline Co. v. State Oil & Gas Board, 457 So.2d 1298, 1312 (Miss. 1984), rev'd on other grounds, 474 U.S. 409, 106 S.Ct. 709, 88 L.Ed. 2d 732 (1986); Damson Oil Co. v. Southeastern Oil Co., 370 So.2d 225, 229 (Miss. 1979); State Oil & Gas Board v. Crane, 271 So.2d 84 (Miss. 1972); Masonite Corp. v. State Oil & Gas Bd., 240 So.2d 446, 448 (Miss. 1970); Superior Oil Co. v. State Oil & Gas Bd., 220 So.2d 602, 603 (Miss. 1969); California Co. v. State Oil & Gas Board, 200 Miss. 824, 842, 27 So.2d 542, 546 (1946). Experience and reflection reveal considerable overlap among these grounds, as none of the four represents a discrete legal compartment, nor is any susceptible of a regimen of mechanical jurisprudence.

The Circuit Court was bound to respect these standards. As they partake of law

and not fact, our review on final appeal is de novo. Mississippi State Department of Health v. Southwest Mississippi Regional Medical Center, 580 So.2d 1238, 1240 (Miss. 1991).

B.

1.

McGowan says the Board's actions violated his constitutional rights, and he points again to his right to due process of law. McGowan's concern here is intra-hearing procedural due process. Assuming arguendo the Board's investigatory/advocacy/decision-making blend does not offend due process, he complains of the procedures the Board employed at his hearings. That he overstates his case should not blind us to the points he makes.

It is by now old hat that the rules of practice, procedure and evidence, formally observed in courts of law, are relaxed in

proceedings before administrative agencies. Most familiar are workers' compensation matters, where our statute law declares the proceedings

> shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter,....

Miss. Code Ann. § 71-3-5 (1972); see also, MWCC Proc. Rule 8; Hercules, Inc. v. Walters, 434 So.2d 723, 726 (Miss. 1983); Sonford Products Corp. v. Freels, 495 So.2d 468, 473 (Miss. 1986). The premise is far broader and is a function of the nature of the administrative board or agency. See Part III above. The premise applies to all administrative or agency hearings, except where otherwise provided by statute. See, e.g., United Cement Company v. Safe Air For The Environment, Inc., 558 So.2d 840, 842 (Miss. 1990); Merchant v. Pearl Municipal Separate School District, 492 So.2d 959, 963 (Miss. 1986); New South Communications,

Inc. v. Answer Hour, Inc., 490 So.2d 1225, 1227 (Miss. 1986); Hancock Bank v. Gaddy, 328 So.2d 361, 364 (Miss. 1976).

These things said, the Board was hardly free to proceed as it pleased. McGowan had important and valuable property rights at risk, and where this is so, common sense suggests a regimen of administrative adjudicatory fairness. Due process always stands as a constitutionally grounded procedural safety net in administrative hearings. See Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1954); Shaughnessy v. United States, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953); Lichter v. United States, 334 U.S. 742, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948); Georgia Pacific Corp. v. McLaurin, 370 So.2d 1359, 1361 (Miss. 1979). We accepted

in McGowan I[11] that

> Board rules must afford minimum procedural due process which is (1) notice, and (2) opportunity to be heard.

McGowan I, 542 So.2d at 248.

McGowan claims more, much more, and that he has no right to a full-blown trial with all the trappings does not mean we should turn a deaf ear. His procedural rights included the opportunity to present his evidence supporting packerless wells and as well

> a reasonable opportunity to know the claims of the opposing party and to meet them.

Love v. Mississippi State Board of Veterinary Examiners, 230 Miss. 222, 230-31, 92 So.2d 463, 467 (1956).

Here the Board supervisor and staff were McGowan's adversary. The Supreme

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[11] The reference is to *State Oil & Gas Board v. McGowan*, 542 So.2d 244 (Miss. 1989), an earlier appeal arising from the controversy at the core of today's case.

Court of the United States has given guidance how we ought regard such a circumstance. Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938):

> The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to mere form of the proceeding and ignores realities. In all substantial respects, the government wwasproceeding against the owners. The proceeding has all the essential elements of contested litigation, with the government and its counsel on the one side and the Appellants and their counsel on the other. It is idle to say that this was not a proceeding in reality against the Appellants when the very existence of their agencies was put in jeopardy.

Morgan, 304 U.S. at 20, 82 L.Ed. at 1133.

We have little difficulty holding McGowan entitled to more than mere minimum due process. Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) guides our thought of how much more. Matthews is in familiar form: the three

part balancing test. It charges that we look at (1) the nature and weight of the public and private interests at stake, (2) the incremental change in risk of an erroneous decision, and (3) the incremental costs of added formality. Matthews, 424 U.S. at 335, 47 L.Ed.2d at 33. We accepted the Matthews formula and guidance in Natural Father v. United Methodist Children's Home, 418 So.2d 807, 810 (Miss. 1982).[12]

This backdrop addresses the forest. We move now to the trees. Not all of McGowan's procedural particulars possess merit, but some do. Not all merit comment, but some do.

2.

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[12] For a more complete discussion of the *Mathews* balancing test, *see* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication* in Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28 (1976).

McGowan complains that, at the conclusion of the January, 1987, hearing, the Board "took the matter under advisement" and continued the hearing until a later date. He points to Board Rule 4 which provides:

> Upon receipt of a proper request or application for hearing, the Board shall call a hearing within thirty (30) days, and after such hearing and with all convenient speed, and in any event within thirty days after the conclusion of the hearing, shall take action with regard to the subject matter thereof.

This rule but echoes the statutory mandate of Miss. Code Ann. § 53-1-29 (1972).

McGowan's argument is excessively legalistic. In the first place, the hearing was not concluded in January of 1987, but, even if it were concluded in a technical sense, the Board had the discretionary legal power to convene anew for additional testimony. In any event, the Board has the authority in matters as

important as this to relax its own rule and reflect upon the matter for a reasonable time beyond the thirty day deadline. We have held the statute upon which Rule 4 is based directory and not mandatory and have refused to invalidate Board orders made later than thirty days after the conclusion of the hearing. State Oil & Gas Board v. Brinkley, 329 So.2d 612, 515 (Miss. 1976); Superior Oil Co. v. Foote, 214 Miss. 857, 883, 59 So.2d 85, 96 (1952). We reaffirm this view and extend it to the Board's stewardship of its own rule.

These things said, there is much that is disturbing in the apparent procedural handling of the Heidelberg petitions in January of 1987. McGowan insists that he was not aware his petitions would be opposed. Nothing of record suggests he is wrong in this. As he puts it in his brief:

> McGowan announced ready at docket call, and no opposition was announced. He innocently

offered his proof, and left.

Brief of Appellant, p. 19. The Board then "took the matter under advisement" while its staff developed opposition which was offered at the next Board meeting.

What is clear is that the Board and its staff were quite familiar with McGowan and his packerless modus operandi before this hearing. Until this point, the Board had approved, albeit provisionally. Fair play suggests McGowan should have been formally notified reasonably in advance of the January, 1987, hearing, if staff intended to oppose his application.[13] Common sense suggests the sort of proof one offers upon a pro forma application to an

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[13] Because the Board may not act arbitrarily or capriciously, the Orders under review have the practical effect of a rule prohibiting packerless completions. had the Board proceeded formally to adopt such a rule, Mcgowan and other affected persons would have been entitled to thirty days public notice of the Board's plans. Miss. Code Ann. §25-43-7(1)(Supp. 1990).

administrative agency is qualitatively different from the sort of proof one marshals when one knows there is staff opposition. Moreover, when the Board took the matter under advisement and decided to continue the hearing, it never formally noticed McGowan of this fact and refused to afford him access to the witnesses and proof it intended to offer in opposition, leading to satellite litigation in the Chancery Court of Hinds County and in this Court, see McGowan I, which should never occur among people who are behaving as they ought. The Circuit Court understated the matter when it said:

> The Board's methodology in this instance does not exhibit the kind of fair play that the public has a right to expect of its administrative agencies.

3.

McGowan renews his McGowan I discovery point. He argues the Board kept from him

that it had retained the services of Ken E. Davis and planned to present him as an expert witness in opposition to packerless wells at the reconvened hearing in February. McGowan admits he got wind of what was going on through someone in the Attorney General's office.

We have addressed the technical point in McGowan I. We are not about to predicate reversal on this point of administrative procedure. Still we do not see how it advanced the Board's search for the truth about packerless salt water disposal wells that McGowan be given less than full opportunity to test and examine the evidence, particularly that of experts staff planned to present. It is but common sense that counsel so circumstanced needs reasonable advance notice and opportunity to prepare to examine a witness such as Davis and to develop evidence, including finding further experts, who might see

things differently. That what McGowan sought would have worked no hardship is evidenced by the Board's new processes which afford such notice.[14]

4.

McGowan is offended that the Board received and considered letters from major oil companies and individuals expressing expert opinions. We have letters as well from administrative officers of other states.[15] These letters suggest that

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[14] See Rule 6(B), *Rules of Order and Procedure Before Board*, State Oil & Gas Board (November, 1990).

[15] Summarized, the letters provide:

EPA

United States Environmental Protection Agency, Region IV, Atlanta, Georgia - letter dated March 18, 1987. The EPA advised the State Oil & Gas Board that packerless wells are largely experimental and do not provide an environmental assurance level as high as standard wells.

KANSAS

In a letter dated June 4, 1987, the

Intergovernmental Coordinator of the Kansas Corporation Commission wrote the State Oil & Gas Board informing them of the approval procedure on the operation of packerless wells. This letter merely copied to the Board the applicable Kansas regulations on the relevant approval procedure, which is subject to a six-part test. These internal regulations were promulgated under the authority of K.S.A. 55-152 (Supp. 1991), which confers on the Commission the mandate to protect the usable water of the State of Kansas from any actual or potential pollution from oil wells. The scientific tests formulated by the Kansas Corporation Commission address such questions such as injection pressure, the depth of the tubing, annulus pressure and frequency of continuing oversight once the permission to operate an oil well without a packer is given.

LOUISIANA

The protection of usable underground water in Louisiana is delegated to the Department of Natural Resources. On May 26, 1987, they wrote the Mississippi State Oil & Gas Board on the matter of packerless wells. The operation of packerless wells is the exception, and not the norm, and the consent to operate one is subject to case by case evaluation, since the technology is still considered experimental.

THE OIL INDUSTRY

Five letters addressed the point:

1. National Institute for Petroleum

(Footnotes continued on next page)

packerless operations are not well regarded and the consent to operate an oil well without one is always accompanied by stringent conditions. McGowan pressed the point before the Circuit Court which denied

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and Energy Research, Bartlesville, Oklahoma - letter dated March 16, 1987. Packer completion assures better protection of underground sources of drinking water.

2. Chevron U.S.A. Inc. - letter dated February 4, 1987. Chevron emphasized that its use of packers in their operations is in obedience to Texas Railroad Commission Rule 9(h)(1).

3. Texaco U.S.A. - letter dated February 10, 1987 - informing the State Oil & Gas Board of the use of packers in its oil operations in Texas, Oklahoma and Kansas.

4. Mobil Oil Explorations & Producing Southeast Inc. - letter dated March 12, 1987. Again, underlining the value of packers and where it is not possible to install one for one reason or another, permission to operate without one must be secured.

5. Conoco - letter dated February 10, 1987. In endorsing the use of packers, Conoco emphasized its commitment to an "environmentally safe industry."

it, ruling

> An administrative agency may receive hearsay evidence where it is corroborated or where there is other satisfactory indicia of reliability.

We agree. This matter of administrative procedure was settled adversely to McGowan's position in New South Communications, Inc. v. Answer Hour, Inc., 490 So.2d 1225 (Miss. 1980), and we have no disposition to revisit it.

It bears re-emphasis, while the hearing regarding McGowan's rights partakes of a quasi-judicial flavor, there is a quasi-legislative dimension to the process, as well. The Board in a very real sense was in these proceedings addressing a question of great public import. Within the tension of its dual duties to prevent waste and guard against environmental hazards, the Board was charged to decide whether packerless completions will be allowed in this state, and, if so, on what

conditions. Whatever else it is doing, the Board is engaged in a search for the legislative facts, those facts which would enable it competently and intelligently to balance the competing interests of enhanced oil production and protection of USDW from salt water contamination. To this end, our law mandates the Board consider all available information and opinions and that the form of some of it does not fit neat descriptions familiar to the adjudicative function goes at most to the weight it should be accorded. See Jones v. Pascagoula Municipal Separate School District, 524 So.2d 968, 973 (Miss. 1988); Merchant v. Pearl Municipal Separate School District, 492 So.2d 959, 964 (Miss. 1986); Noxubee County Board of Education v. Givens, 481 So.2d 816, 820 (Miss. 1985). None of this is at odds with the rule of rudimentary fairness. Hercules, Inc. v. Walters, 434 So.2d 723, 724 (Miss. 1983);

Love v. Mississippi Board of Veterinary Examiners, 230 Miss. 222, 230, 92 So.2d 463, 467 (1956).

5.

There are more, but some of McGowan's points--such as that the Board refused to enforce "the rule" on sequestration of witnesses--are a bit much. Still, the process in the aggregate seems lacking and we think back to the Matthews formula. Unfortunately, we have not been favored by a competent briefing of the Matthews balancing test. In the circumstances, we may only hold McGowan has not convinced us the proceedings below offended his procedural due process rights.

This is not to say we are any more impressed with (some of) what happened below. We note the Board has substantially enhanced its procedural schema since McGowan's hearings in 1987. At oral argument, the Board's counsel advised

> most of the things that he argues should have been done from a procedural standpoint during that hearing are done routinely right now before the Board.

Counsel for McGowan conceded as much. Our independent review and reflection upon the Board's new rules suggest this may be so,[16] and we applaud the Board's progress. These points, coupled with the disposition we make below, make it unnecessary that we subject the Board's 1987 procedures to ultimate Matthews scrutiny.

V.

McGowan charges that the Board's actions were arbitrary and capricious, and when he does so he is careful to emphasize that this charge is substantially interrelated with his other complaints, first, that he was denied intra-hearing

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[16] *See Rules of Order and Procedure Before Board*, State Oil and Gas Board (November, 1990).

procedural due process and, prior thereto, that the Board behaved in an institutionally impermissible manner. We, too, accept the interrelatedness of the claims and would note further a not-inconsiderable relation to the substantial evidence rule.[17] We have recently written:

> These familiar standards, though not synonymous, overlap sufficiently that we often consider them simultaneously.

Riddle v. State Board of Pharmacy, 592 So.2d 37, 41 (Miss. 1991). Of importance, judicial review under either or both of these standards is necessarily a function of the court's ability to divine with confidence what the Board has done and how it has done it. Implicit in this review regimen is a distinct disenchantment with

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[17] McGowan says the Circuit Court's consideration of the other points he raises was so deficient that we never get to the question of whether there was substantial evidence to support the Board's ruling.

the intuitionist style of so much agency decision making.

Mississippi State Department of Health v. Southwest Mississippi Regional Medical Center, 580 So.2d 1238 (Miss. 1991) speaks of the arbitrary-and-capricious standard in administrative law.

> The terms "arbitrary" and "capricious" are open-textured and not susceptible of precise definition or mechanical application. We find helpful meanings North Carolina has assigned in a not-dissimilar context:
>
> "Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone,--absolute in power, tyrannical, despotic, non-rational,--implying either a lack of understanding of or a disregard for the fundamental nature of things.
>
> "Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and

> settled controlling principles... [Citation omitted]

Dept. of Health, 580 So.2d at 1240. The reviewing court is charged to study the record and the legislative facts to which the challenged order points and divine a rational basis upon which the administrator may have acted. The standard invokes the rule of relevant resemblances and proscribes unprincipled discrimination between and among those similarly situated. It condemns ad hoc decision-making and, because it is a standard of judicial review, imports an imperative that administrators say at least minimally why they do what they do so someone can see whether it be arbitrary or capricious.

This criteria imports as well substantive standards, without which the entire process would be arbitrary and capricious and illegal. We look to our legislature which has made its judgment and

has declared it the policy of this state

> to protect the public and private interests against the evils of waste in the production and utilization of oil and gas, by prohibiting waste as herein defined;....

Miss. Code Ann. § 53-1-1 (1972). Employing the sovereign prerogative, the legislature has defined "waste" and has brought within "waste," inter alia,

> the...equipping, operating or producing of any oil or gas well or wells in a manner which results or tends to result in reducing the quantity of oil or gas ultimately to be recovered from any pool in this state.

Miss. Code Ann. § 53-1-3(l)(l) (1972 and Supp. 1991). To this end, the legislature has, inter alia, created the Board and has empowered and directed that it make

> such reasonable rules, regulations and orders as may be necessary from time to time... to prevent waste as defined herein.

Miss. Code Ann. § 53-1-17(c)(1) (1972).

What is important is that this same act directs the Board pursue another

policy. Section 53-1-17(c)(1) tells the Board "to prevent pollution of freshwater supplies by oil, gas, or salt water" and to that end, as well, make "such reasonable rules, regulations and orders as may be necessary."

It requires little thought or reflection to see that we have been given two goals--public policies, if you will--rationally and practically at odds with one another. Considerable scientific, engineering and technical expertise must inform any intelligent evaluation of waste and environmental hazard in the context of a particular producing oil well. Policy must inform the balance finally struck and, since the property and enterprise of citizens are greatly affected, procedural fairness must be served.

We have in a wide variety of contexts recognized the role of expertise in the administrative agency. See, e.g., Grant

Center Hospital v. Health Group of Jackson, Miss., Inc., 528 So.2d 804, 810 (Miss. 1988); Eidt v. City of Natchez, 421 So.2d 1225, 1231 (Miss. 1982); Colonial Savings and Loan v. Security Savings and Loan Assoc., 288 So.2d 857, 859 (Miss. 1974); First National Bank of Vicksburg v. Martin, 248 So.2d 856, 858 (Miss. 1970). The existence within government of discrete areas of quasi-legislative, quasi-executive, quasi-judicial regulatory activity in need of expertise is the raison d'etre of the administrative agency. Because of their expertise and the faith we vest in it, we limit our scope of judicial review.

Our concern this day is that the Board has not exhibited its expertise. The several McGowan hearings presented the Board with wormy questions that interlaced policy, science and adjudicatory fairness. We have before us a substantial record with

much testimony and rhetoric that packerless wells prevent waste. They do this, we are told, through enhanced economic feasibility of production in the oil well's latter days. We are told, as well, that packerless wells are not only safe, but that they can be adequately tested and monitored, though this is contradicted by other opinion testimony.

We know that the Board rejected McGowan's packerless wells, but we are not quite sure why. In the face of conflicting policy imperatives and (particularly on the environmental issues) conflicting testimony, the Board acted, but we do not know what it was about the evidence opposed to packerless wells that persuaded the Board. What we have before us is a series of orders which, in the most conclusory terms, recite that the Board has received "numerous hours of testimony and numerous dockets, exhibits and other evidence which

have been thoroughly and exhaustively considered," by reason of which it ruled against McGowan. On each occasion the Board acted "by a majority vote," and the record reflects that this means a three-to-two vote. We certainly will accord a three to two vote the same deference as five-to-nothing. Still, the closeness of the vote goes to emphasize our need for understanding the reasons why the Board ruled as it did, else how can we determine whether the Board acted arbitrarily or capriciously and/or whether substantial evidence undergirds its actions.

It cannot be overemphasized, legislative policy mandates that the Board eliminate waste and USDW pollution,[18] nor are we told which trumps. Of course, the

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[18] All that we say in this part accepts, as well, that the board and this state may be subject to superior federal authority in the premises.

policies compete, and unreasoned preference of one by definition is arbitrary. In any such competition there are, always have been, and always will be losers. We are never going to prevent all waste, nor are we going to eradicate all environmental hazards. We need to know something of the costs and risks associated with each of these conflicting interests before we can on judicial review intelligently consider whether the Board acted arbitrarily and capriciously or whether its decision was supported by substantial evidence. We need to know how the Board regarded the social costs of packerless wells and the extent of the attendant reduction in waste vis-a-vis the social cost of requiring packers and the attendant reduction of risk of USDW pollution.

Make no mistake about it, the several inarticulate orders here under review are

far more global than John W. McGowan v. State Oil and Gas Board. They establish statewide policy.[19] This implies a more massive externality problem in which all entrepreneurs who demonstrate ability and expertise may pursue packerless wells. The Board must as well consider the costs and risks to all who consume and benefit from USDW. If it should be that the measurable losses attributable to contaminated USDW exceed the benefits of packerless wells, the Board's orders should be sustained. On

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[19] Interlaced with the Orders here under review is the board's September 17, 1987, Order No. 395-87 amending Statewide Rule 63 regulating Underground Injection Control. The amended rule prohibits packerless salt water disposal wells, subject only to a general exception clause, which mentions neither packerless completions nor air pressure testing. Order No. 395-87 is consistent with the several individuated McGowan orders noted above and suffers the same infirmities--the lack of findings or balancing. The Circuit Court vacated this Order on August 5, 1988. Effective April 20, 1989, the Board adopted a new, amended Rule 63 "supersed[ing] Order No. 395-87."

the other hand, if perchance packerless well benefits should exceed contaminated USDW costs, it would be difficult to imagine on what rational basis the Board decided as it did, assuming only that it sought and considered data and expert opinions of adequate quality. Our concern of the moment is that the Board has given us nothing suggesting it ever thought of these points, much less decided them.

Consistent with "relaxation," we have no thought of imposing any procedural duty that will not be cost effective. See Matthews v. Eldridge, 424 U.S. at 335, 47 L.Ed.2d at 33 and Part IV(B)(2) above. Still, we have often noted

> The greater weight of authority holds it to be better form for a fact finding administrative agency or commission to make a finding of facts on which...[it] bases[s]...[its decision].

Rivers Construction Co. v. Dubose, 241 Miss. 527, 536, 130 So.2d 865, 869 (1961),

quoted in Fortune Furniture Manufacturing Co., Inc. v. Sullivan, 279 So.2d 644, 647 (Miss. 1973). On judicial review of a Mississippi Public Service Commission order setting freight rates, we told the Commission to make findings of ultimate fact, Illinois Central Railroad Co. v. Jackson Ready-Mix Concrete, 243 Miss. 72, 83-85, 137 So.2d 542, 545-46 (1962), and en route repeated the obvious:

> If an agency does not disclose the reason upon which its decision is based, the courts will be usurped of their power of review over questions of law.

Illinois Central, 243 Miss. at 83-84, 137 So.2d at 545. Among those questions of law are whether board action is arbitrary and capricious and whether it is supported by substantial evidence.

Our concerns in summary are two-fold. First, findings. The Board has made at best a minimal, implicit finding on the environmental hazard the law puts in its

charge (though we do not know whether its concern is substantive safety or ability to test and monitor), but the Board has said nothing on the waste issue. It is a logical and legal prerequisite to intelligent judicial review in these cases that the Board favor us with more than mere conclusory findings on each of these issues, together with a summary of the grounds for these findings.

Second, and equally important, we have before us two competing policy imperatives. We need as well the benefit of the Board's balancing of these and articulation of the reasons why it finds one overpowering the other. Otherwise, we may not know or even begin to consider whether the Board's orders be arbitrary or capricious.

There may, of course, have been more local reasons for the Board's actions. For example, the rejections may have been the product of applicant-specific deficiencies,

such as McGowan's inability to provide adequate evidence that he can do what he says he can do. Again, we do not know by reason of the Board's lack of findings or explanation.

VII.

We vacate the orders below and remand to the State Oil and Gas Board. The Board may reopen, a course we encourage (but do not require) in view of the improved procedures the Board has implemented since 1987. Or, the Board may proceed as all concerned may agree, or as may otherwise be appropriate. The Board may, if it deems it appropriate, stand by its prior orders, provided only that it make more than conclusory "written findings of fact and conclusions of law setting forth the reasons for the Board's decision."[20]

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[20] We think it important that the Oil and Gas Board has by rule provided that a party may, upon request, receive "written findings of fact and conclusions of law

Nothing said here implies so much as a hint what the Board should do, so long as its further proceedings are not inconsistent with this opinion.

VACATED AND REMANDED.

ROY NOBLE LEE, C.J., HAWKINS, P.J., PRATHER, SULLIVAN, PITTMAN, AND McRAE, JJ., CONCUR. DAN M. LEE, P.J., CONCURS IN RESULT ONLY. BANKS, J., NOT PARTICIPATING.

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setting forth the reasons for the Board's decision." Rule 10(A), Rules of Order and Procedure, Oil and Gas Board.

IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

JOHN W. MCGOWAN — APPELLANT
VS.
CAUSE NOS. 35,248, 35,249 35,250, 35,483 35,440, 35,822, 35,740

THE STATE OIL & GAS BOARD — APPELLEE

OPINION AND ORDER

This matter is before the court on appeal from orders of the appellee, State Oil & Gas Board (hereafter "the board"). Each order in effect denies appellant, John W. McGowan (hereafter "McGowan"), a permit to operate a salt water disposal well without a "packer".

McGowan raises several procedural issues as well as claims that the orders of the board are violative of his constitutional rights, arbitrary and capricious and not supported by substantial evidence. He takes a novel approach to the procedural issues, however, in that he does not request a new hearing but rather that the court consider the procedural

transgressions as evidence of arbitrariness and bad faith on the part of the board and grounds for assessing the board's decisions on something other than the substantial evidence standard, should the court determine that there is, in fact, substantial evidence upon which the board could have based its ruling. Leaving aside the questions raised by the suggested remedy, the court will first address the argued transgressions.

I. The State Oil & Gas Board arbitrarily and capriciously denied Appellant procedural due process guaranteed by the 5th Amendment to the U. S. Constitution in the conduct of the proceedings appealed from. Specifically:

1. The Board erred in sitting in a judicial or quasi-judicial capacity over a hearing in which it had assumed an adversarial interest as a party.

It appears that McGowan complains that

certain members of the board were prejudiced and that the board as a whole took an adversary posture in the hearing and was therefore incapable of rendering a judgment which accorded him due process. Taking the last claim first, the court notes that it is not unusual that administrative agencies "investigate violations of law and act as accusers as well as determining violations of their own regulations or act as advocates or prosecutors as well as judges in the same proceedings * * * [and that] this combination of functions has never been held to violate constitutional rights or deny due process." 1 Am. Jur. 2nd Section 78, p. 873.

This state of the law was recognized and approved by the United States Supreme Court in Withrow v. Larkin, 421 U. S. 35, 43 L.Ed. 2d 712, 95 S.Ct. 1456 (1975) where that court noted that, although Section 5

of the Administrative Procedures Act precludes employees of agencies from adjudicating matters which they have investigated or prosecuted, the provision exempts "the agency or a member or members of the body comprising the agency" and that "the case law, both federal and state, generally rejects the idea that the combination of judging and investigating functions is a denial of due process." 421 U. S. at 52.

The Withrow court found a presumption of honesty and integrity in those serving as adjudicators and recited a litany of situations in which no due process violation has been found including instances where the commission members had made public statements or given congressional testimony concerning facts involved in the matter to be adjudicated. The court cautioned, however, that the fact "that the combination of investigative and

adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from special facts and circumstances present in the case before it that the risk of unfairness is intolerably high." 421 U. S. at 58.

This court has reviewed the record and does not find facts and circumstances which indicate such unfairness as would rise to the level of a due process violation. On the contrary, it appears that the hearing was conducted in a fair and even-handed manner.

McGowan did seek to subpoena two members of the board, apparently to testify on the issue of prejudice. Those subpoenas were quashed based on "judicial immunity." The propriety of this action need not be discussed, however, in light of the fact that McGowan did not seek to question these members in any other manner, although they

were present during the hearings. The discussion of whether the subpoenas should be quashed arose out of a discussion of the issue of witness sequestration which will be treated later in this opinion. There was not a discussion of whether these or any other members of the board would be subject to examination concerning prejudice.

McGowan has cited only one other instance in the record touching on this question. There, his attorney sought to question Dr. Henderson, the board Supervisor, concerning the decision to call a certain expert witness. The response there and elsewhere was that McGowan would not be allowed to delve into decisions of the board made in executive session, presumably concerning the witnesses to be called and evidence to be presented on behalf of the board. McGowan cites this instance as evidence that the board was in

an adversarial position towards him.

That this is so, however, does not deprive McGowan of fundamental rights. Withrow, Supra. "The fact that the charges are made by the same body which tries the issues thereunder does not, in itself, operate as a disqualification." 1 Am. Jur. 2d Section 64, p. 861.

2. The board erred in re-opening the proceedings in Cause No. 35,249 over Appellant's objection after Appellant had concluded his case unopposed and rested; and acted in a grossly arbitrary and capricious manner in attempting to surprise Appellant with such opposition.

Here McGowan claims that the board violated its own rules by failing to rule upon a matter noticed for hearing within 30 days after the hearing concluded and instead reopening the matter. Rule 4 of the Rules of Order and Procedure for Hearings Before Board provides as follows:

> 4. Upon receipt of a proper request or application for hearing, the Board shall call a hearing within thirty (30) days, and after such hearing and with all convenient speed, and in any event within thirty (30) days after the conclusion of the hearing shall take action with regard to the subject matter thereof.

In the instant case, with regard to the Heidelberg applications, McGowan submitted his petitions and noticed them for hearing in accordance with the statute and rule. There was no contest and the hearing was concluded in January, 1987. No decision was announced in open session and the rather than reach a decision entered an order "on its motion to take the matter under advisement and continue the same."

At a subsequent board meeting, after several continuances, additional evidence was produced by the board. The fact that additional evidence would be produced and considered was not officially announced to McGowan. He was informally advised by one

of counsel representing the board that evidence was being gathered for presentation.

The board's methodology in this instance does not exhibit the kind of fair play that the public has a right to expect of its administrative agencies. Nevertheless, the issue is whether the board had the power to "reopen" this matter for further evidence. This court concludes that it had. State Oil & Gas Board v. Brinkley, 329 So.2d 512 (Miss. 1976); Superior Oil Co. v. Foote, 214 Miss. 857, 59 So.2d 85, 37 ALR 2d 415 (Miss. 1952) Moreover, McGowan was not prejudiced by reopening. Ultimately, he had the opportunity to put on rebuttal testimony and evidence and he has not complained that his right or ability to do so has been limited in any way. The effect of any "surprise" therefore has been obviated.

3. The board erred in quashing

certain of appellant's subpoenas of witnesses.

This matter is not addressed in appellant's brief as a separate argument and it is alluded to hereinabove with reference to point one. It should suffice to say that whether error or not McGowan has not shown that he was prejudiced in any way on account of the board's quashing subpoenas issued to two of its members. The office of a subpoena is to compel attendance. It is this court's understanding of the record that the persons subpoenaed were present. McGowan did not seek to examine these persons in any way. Certainly, if there was a legitimate inquiry into the personal prejudice or interest of any member, examination should be allowed either as a part of the hearing or in some other manner for the record. McGowan's thrust, however, appears to be that the board was somehow in

an "adversarial" position. That, of course, is obvious from the record and admitted at one instance by the chairman. This does not invalidate the proceedings.

4. The board erred in denying appellant's motion for discovery. McGowan moved for pre-hearing discovery with regard to all of these matters and upon denial of that motion filed an action in Chancery Court seeking discovery. The board denied discovery on the ground that such was not available in an administrative proceeding. McGowan then filed a complaint in the Chancery Court of Hinds County and as a result was given access to certain information, before the hearing.

Certainly, fundamental fairness would dictate that a party to an adversarial proceeding be given a fair opportunity to meet the evidence to be presented against him. "The right of a hearing . . . embraces not only the right to present

evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." Love v. Mississippi State Board of Veterinary Exam. 92 So. 2d 463 (Miss. 1956). Again, however, McGowan raises this issue not to show prejudice for lack of discovery but rather to point to the conduct as indicative of the adversarial posture of the board and Dr. Henderson. In the absence of prejudice, the failure to grant discovery cannot be grounds for reversal standing alone.

5. The board erred in refusing to invoke the rule regarding exclusion of witnesses after being requested to do so by appellant. The board refused to impose the rule of sequestration on members of its staff. McGowan seems to complain about this ruling only as it affects the testimony of Dr. Henderson and the effect of his presence on the testimony of members of his staff. The evidentiary rule of

sequestration applies only to court proceedings or proceedings had in connection with court actions. Rule 101, Mississippi Rules of Evidence. There may be circumstances under which elementary fairness would dictate that the rule be applied in administrative proceedings. In the instant case, however, application of the rule would probably have led to the same result. Dr. Henderson might easily have been exempt from the rule in court under exceptions (2) and (3) of the sequestration rule. Rule 615 MRE.

6. The board erred in admitting hearsay evidence, specifically certain letters addressing litigated technical issues. During the hearing certain evidence in the form of letters expressing opinions and describing practices with regard to the procedure at issue were presented and accepted over McGowan's hearsay objection. The board ruled that

the documents were admissible and were to be given such weight as the board may decide and it was indicated by counsel advising the board that McGowan was free to submit similar materials.

It is generally held that an administrative agency may receive hearsay evidence where it is corroborated or where there is other satisfactory indicia of reliability and that appears to be the law of this state. 73A C. J. S. Section 129, pp. 39-41; Noxubee County Board of Education v. Givens, 481 So.2d 816 (Miss. 1985); Love v. Mississippi State Board of Veterinary Exam, Supra. It is usually said that an adjudication of an administrative agency cannot be founded wholly on hearsay evidence but that such evidence can be admitted for such "additional light" it may throw upon a matter. See e.g. 73A C. J. S. Section 129, pp. 40-41, Note 71. In other words, while hearsay evidence is

admissible, in the usual case the decision of an administrative agency must rest on substantial evidence other than hearsay.

Here the hearsay evidence in question was of a supplemental and corroborative nature. Live testimony was introduced regarding the issues and the decision of the board cannot be said to have rested solely, if at all, on the hearsay evidence.

7. The board erred in allowing witnesses Rendeiro and Davis to give unqualified expert testimony over appellant's objection. McGowan complains that two of the expert witnesses should not have been allowed to express opinions. Although it is not mentioned in his assignment of errors, McGowan complains in his brief that one of the witnesses was called in "rebuttal" or perhaps "sur-rebuttal". It is clear that the board has the right to conduct the proceedings in any way that it sees fit as long as notions of

fundamental fairness are not violated. In this instance McGowan was not denied the right to call additional witnesses and the board maintained the status quo allowing McGowan to continue to operate during the period of delay for the purpose of hearing the additional witnesses. There was no error in allowing the additional witness on grounds of the irregularity of the order of his appearance.

McGowan also objected to the opinion testimony offered by a petroleum engineer and the owner of a company which provides engineering services to petroleum companies on the basis that they were not qualified to render certain of the opinions. The objections were properly overruled by the board as each witness demonstrated sufficient experience, education and training to permit them to testify as experts on the subjects embraced by their opinions. Any deficits in hands-on

experience with particular applications or procedures as opposed to familiarity with their theoretical basis should be and presumably were considered in weighing the testimony. Such deficits, if any, did not affect admissability.

In summary, the procedural issues raised by McGowan were, for the most part, not procedural violations at all and the rulings of the board were either correct, well within the discretion of the board or harmless. Such errors as were made fall far short of compelling a determination that the board acted in an arbitrary and capricious manner in violation of McGowan's right to due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Having said that, however, this court feels compelled to express its distaste for the attitude of the board concerning pre-hearing disclosure. The board should make every

effort to assure that persons appearing in adjudicatory proceedings are afforded with advance information with regard to the evidence that they are expected to meet. It goes without saying that such pre-hearing disclosure is a reciprocal process.

II. The rulings appealed from are not supported by substantial evidence: and are arbitrary and capricious in that such rulings are contrary to the overwhelming weight of the evidence; and evidence an inconsistent application of the law and its rules by the Board, as well as a violation of the board's statutory duty to prevent waste.

Substantively, this case involves: (a) the revocation of three permits for violation of the terms of the order; (b) the denial of three permits; and (c) the imposition of a fine for operating an unpermitted well after expiration of the temporary permit under which it previously

operated. All of the permits were for the operation of salt water disposal wells without "packers" and much of the testimony came from expert witnesses describing the relative merits of operating with or without a packer with regard to protection of the underground sources of drinking water. There was expert testimony to the effect that the packerless concept does not provide an acceptable degree of assurance of non-polluting operation. McGowan and his experts testified to the contrary presenting a factual issue which the board could and did determine. The opinion evidence in the record provides substantial evidence for the decision of the board to deny the permits applied for and this court is precluded from substituting its judgment in that regard for the judgment of the board.

The question of revocation is a different matter. Here the board imposed

a sanction for a violation of its prior orders permitting the wells in question and violation of a Statewide Rule. There is no dispute that there was a violation. The question is whether the board fashioned a sanction which is so harsh as to abuse its discretion or, put another way, whether the sanction is so disproportionate to the transgression that the board can be said to have acted in an arbitrary and capricious manner.

The orders permitting the wells in question provide the following condition:

> d. Conduct a pressure mechanical integrity test, using a packer, of the tubing-casing annulus each time a well is pulled. After this test, condition third (c) above would then apply.
>
> e. If, at any time . . . the foregoing-listed items are not performed, then, the operator shall immediately close the well, notifying the Oil & Gas Board of same within twenty-four (24) hours and in writing within five (5) days and do one of the following:

> (1) Bring the well into full compliance with this order within ninety (90) days; or
>
> (2) Plug and abandon the well according to Rule 2B within ninety (90) days...

The orders permitted the wells "so long as the conditions enumerated above are complied with."

Rule 45B of the Statewide Rules and Regulations of the Oil & Gas Board provides that the operator shall notify the Supervisor of the State Oil & Gas Board before proceeding with any "downhole work" and that,

> [i]f any operator shall fail or refuse to comply with[sic] the provisions of this rule, the Supervisor may prohibit the operation of any such well until the operator takes such action as may be necessary to prove to the satisfaction of the Supervisor that the operator is in full compliance with all of the orders of the Board approving such well, the statutes of the State of Mississippi and the rules and regulations of the Oil & Gas Board.

Rule 63 III G 4. provides that permits

are for the life of the well but may be revoked, modified and reissued or terminated "for cause after notice and hearing." Subsection 4. C. provides the grounds for revocation, modification or termination as follows:

> (1) There is a substantial change of conditions in the enhanced recovery injection well or the disposal well operation, or there are substantial changes in the information originally furnished.
>
> (2) Information as to the permitted operation indicates that the cumulative effects on the environment are unacceptable, such as pollution of USDW's.
>
> (3) There are substantial violations of the terms and provisions of the permit.
>
> (4) The operator has misrepresented any material facts during the permit issuance process.

Here the board apparently chose not to utilize the remedies provided in the permitting orders or the remedy prescribed in Rule 45 B, but instead opted to pursue

modification, apparently under the authority of Rule 63. The board made no specific findings and simply entered orders modifying the permitting orders to require a packer. The record before the board does not permit a finding of any of the enumerated causes for modification. The only possible cause would be a finding that McGowan committed a substantial violation of the terms and provisions of the permit.

The essentially undisputed facts are that McGowan discovered a problem with one of his wells and reasoned that two other wells developed at the same time using the same material could be affected. He then pulled those wells to inspect them for that purpose. The Supervisor was not notified and the wells were not packer tested. McGowan freely admits the error and blames the failure to notify the Supervisor on the relative recency of the rule requiring notification and his failure to run a

packer test on the fact that the wells had been pressure tested only a few days before they were pulled. The wells in question were not shown to have been polluting and they had been in operation for approximately three years.

In the view of this court there is not substantial evidence in the record to support a finding that there has been a "substantial violation" of the conditions of the orders in question.

III. The Cranfield Field Penalty.

An order of the board imposing a penalty of $20,000 on McGowan for operating the Cranfield Field without a permit for the period August 13, 1987 through September 1, 1987 has been appealed and that appeal[sic] is consolidated with the appeal of the orders treated herein above. Cranfield was one of the three permits denied by the board. Earlier that field had been "permitted" temporarily pending a

final decision of the board with regard to the three permit applications and the "modification" hearing. The terms of this permit were that it was to expire upon a final decision of the board.

The final decision of the board was made on July 22, 1987, and orders reflecting the decision were filed on August 6, 1987. McGowan contends he received notice of filing on August 12 and he filed notice of appeal and a motion for stay on August 13. He sought an immediate hearing in this court and that hearing was delayed because of the unavailability of the judge. Before a hearing on the stay request could be conducted the board issued a show cause order regarding McGowan's continued operation of the well without a packer. The result was the order appealed from here.

Eventually, this court held a hearing on McGowan's request for a stay and granted

the stay. This court is of the opinion that its grant of a stay renders the order of the board imposing the penalty a nullity. Moreover, the court finds that the imposition of a penalty in this magnitude under the circumstances of this case is arbitrary and capricious and should be set aside.

IV. Related Rulings.

Also before this court is an appeal from an order of the board amending Rule 63 deleting the provision authorizing packerless completions as an "exception", and two appeals from orders denying permits for packerless wells. There is no order formally consolidating the Rule 63 appeal with this action but the court hereby consolidates it, sue sponte.

The parties rest primarily on the record made on the board's motion to modify and McGowan's application. Having decided that the record provides substantial

evidence upon which the board could base a decision denying a permit without a packer, it follows that the rule change here appealed and the subsequent similar rulings are well within the discretion of the board. Accordingly, the orders appealed from in cause numbers 35,440, 35,740 and 35,822 will be affirmed.

CONCLUSION

The record in this case is relatively large and somewhat disjointed due to the number of hearings involving different wells and issues. Hostility between McGowan and his attorney, who is also his brother, and the board is evident. The court is aware that the orders appealed from were made on a three, two vote. At McGowan's invitation this court has also reviewed the record in an earlier appeal involving these parties and an attempt to impose sanctions which was nullified by this court. Perhaps that was the genesis

of the hostility.

Nevertheless, this court feels compelled to accord to this agency a presumption of regularity and integrity and that presumption has not been overcome by facts evident in this record. This court is therefore duty-bound to adhere to the substantial evidence rule with regard to the central issue in these proceedings, whether the board should permit further packerless completions at this time.

In summary, the orders denying permits on the Cranfield and Heidelberg applications (cause numbers 35,249 and 35,250), the order amending Rule 63 (cause number 35,440) and the orders in cause numbers 35,740 and 35,822 shall be affirmed and the orders modifying permits for the Tinsley and Pickens wells (cause number 35,248) and the orders imposing a penalty for operating the Cranfield well during the pendency of this appeal (cause number

35,483) are reversed and vacated. The stays granted pending this appeal shall remain in effect pending perfection of an appeal from this order or the expiration of time in which to do so.

Ordered this 5th day of August, 1988.

CIRCUIT JUDGE
FRED L. BANKS, JR.

IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

JOHN W. MCGOWAN — APPELLANT

VS. CAUSE NOS. 35,248, 35,249 35,250, 35,483 35,440, 35,822, 35,740

THE STATE OIL & GAS BOARD — APPELLEE

ORDER

This matter is before the court on appellant's Motion to Reconsider and Alter or Amend the Judgment entered in this matter. This court has reviewed the submissions of counsel and concludes that the motion should be denied.

For the most part, the opinion of this court previously filed, amply states the reason for this court's ruling. Supplementarily, however, it is here noted that this court did not fail to reverse and remand simply because the appellant stated that remand was not his desire but because in the view of the court the errors noted

did not warrant reversal.

The faults found with the proceedings below by this court have to do with notice of opposition and discovery. The facts are that appellant received some discovery as a result of Chancery Court proceedings. That fact, together with the fact that these proceedings were conducted over the course of several meetings, resulted in a proceeding in which appellant was not precluded from offering any rebuttal testimony or evidence to which he had access. He never sought a continuance to obtain evidence nor did he offer any evidence which was precluded. Thus, it is that this court concludes that appellant was not prejudiced by the initial lack of notice or discovery. The testimony and other evidence allowed may have in fact been prejudicial to his position but the proceedings were not prejudicial because he was never denied the opportunity to rebut

that evidence.

Appellant's Motion to Reconsider and Alter or Amend Judgment is hereby DENIED.

Ordered this 27th day of September, 1988.

_____

CIRCUIT JUDGE

MANDATE FROM THE SUPREME COURT OF MISSISSIPPI

To the Hinds County Circuit Court,
First Judicial District - GREETINGS:

On 24th day of June, 1992, in proceedings held in the Courtroom, Carroll Gartin Justice Building, the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case #07-CA-59604
Trial Court Case #35248

John W. McGowan
vs.
Mississippi State Oil & Gas Board

Second Motion to Expedite Dismissed as Moot.

Vacated and Remanded. Dan Lee, P.J., Concurs in result only. Banks, J., not participating. Appellee is taxed with all costs of this appeal.

WEDNESDAY, AUGUST 12, 1992

Petition for Rehearing Denied. Banks, J., Not Participating

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

WITNESS, the Hon. Roy Noble Lee, Chief Justice of the Supreme Court of Mississippi; also the signature of the Clerk and the Seal of said Court

hereunto affixed, in the City of Jackson, on August 28, 1992, A.D.

_____

SUPREME COURT CLERK

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN W. McGOWAN — APPELLANT

VS. — NO. 59,604

THE STATE OIL AND GAS BOARD — APPELLEE

PETITION FOR REHEARING

THIS COURT vacated the Oil & Gas Board Orders which were the subject of this appeal. To the casual reader of Southern Reporter, it will therefore appear that the Appellant won this case. Nothing could be further from the truth. This Court has dealt the Appellant; packerless salt water disposal technology; and constitutional due process - a death blow. In the final analysis, this case is a simple one. Appellant is required by reason of the exhaustion of administrative remedies doctrine to apply first to the agency for authority to utilize his packerless technology in the design of salt water disposal wells. But this same agency which

would adjudicate the issue decided before the hearing began that it would rule against McGowan. This is not speculative argument. The Board itself hired attorneys and expert witnesses and formally opposed the very application it was to rule upon. The theory discussed in the opinion about separation of functions within the agency is just that - theory. None associated with this case has ever represented to the Court that the Board staff presented evidence to an impartial Board. The staff could not hire and pay experts without Board authorization - Board direction, in fact. Counsel for Appellee himself told this Court in his brief:

> The Board reached their own conclusion on the matter when they decided that they too should oppose packerless wells.

As this Court noted at the beginning of the opinion, the idea that a litigant may adjudicate his own dispute runs

contrary to our oldest and most fundamental legal concepts. Yet somehow, by the end of the same opinion, this judicial aberration was rationalized. So be it. At least we have a definite ruling on the issue.

Appellant, however, presented another very specific legal question to the Court which was not addressed at all in the opinion. If one's adversary is also one's judge, it is a reasonable assumption that one's adversary will not be inclined to pay much attention to the evidence. Moreover, from its adjudicatory position, the agency can control the evidence through its procedural rulings, and thereby render the evidence in its favor more "substantial" than it would be otherwise. Aside from the obvious deprivation of due process necessarily associated with such a scheme (which deprivation the Court ignored or excused because of the Board's promise that it does not act that way anymore); it

cannot be denied that the agency which both advocates and adjudicates will not base its decision on the evidence, because it made its decision when it determined to oppose the application - before the evidence was presented! It is also undeniable that the agency will attempt to color the evidence through its procedural rulings in a shade favorable to the position which it advocates.

Nonetheless, at the next level, the Circuit Court Judge reasoned that he was unable to <u>independently</u> weigh the evidence because of the substantial evidence rule. He ruled that since there was substantial evidence in the record to support the Board's decision, the Court would decline to independently review and weight the evidence on appeal, as the agency has superior technical expertise, and should be afforded a presumption of fairness and integrity. This is frightening. We will

not only allow one's adversary to adjudicate his own case, but go one step further and afford him the presumption that in doing so he fairly and impartially weighed the evidence? We pointed out to this Court that the substantial evidence rule was applied - in every single case - where the agency was adjudicating a dispute between two other litigants. The rule necessarily assumes that the tribunal being given the benefit of the substantial evidence rule is unbiased. It is simply incredible to suggest that deference should be given to an agency's expertise - and that it should be afforded a presumption of impartiality - when that agency is an announced litigant in the proceeding! The agency decided before the hearing began - when it determined to oppose the application - that it would rule in its own favor! Why in the world would it look at the evidence? And if by reason of this

rule limiting the scope of judicial review of administrative decisions, the appellate courts will not look at the evidence either, then the evidence is never reviewed and weighed at any level. It might as well never have been presented.

So we asked this Court to rule on a very specific question - does the substantial evidence rule have application in the Withrow situation (which this Court has ratified) where the agency both advocates a position and adjudicates the dispute? But the Court never even addressed the question. It was obviously our hope that this Court would rule that the substantial evidence rule does not have application in that instance, and that this Court itself would weigh the evidence in this record. At worst, the case would have been remanded to the Circuit Court with instructions to independently review and weigh the proof. Instead, this Court held

that the Board must specify the substantial evidentiary basis of its decisions, and remanded the matter all the way back down to the Board. We assume (the opinion does not specifically tell us) that an appeal from further Board action will be to Chancery Court, and then to this Court again by normal process.

It is essential that we make this point to this Court. The opinion discussed the possibility that packerless technology may hold the promise of some relief for a beleaguered oil and gas industry. We will never know, because if the assumptions we make regarding further appellate process are correct, this Court will not see this case again. McGowan filed the instant application with the Board almost six years ago. He was forced to try his case before an obviously hostile agency which had already decided to rule against him and even presented a case in opposition to his

application. (Despite the Court's ruling to the contrary, this attorney will always believe that such a process is the most abhorrent deprivation of due process imaginable. All the opinions in the world will never make me understand now such a process can be tolerated by our legal system.) That agency, obviously, never looked at the evidence. McGowan appealed to Circuit Court, and it was over a year before an opinion was rendered which declined to review the evidence. This Court considered the appeal for almost four years; also declined to consider the evidence; and remanded the case back to the Board. McGowan is back where he started six years ago, except that he has parted with considerable attorney's fees and endured considerable anxiety in the interim. Let me assure the Court, should it have any doubt about the matter, that the Board still formally opposes packerless

completion as a matter of policy. When it rules against McGowan again, we assume that an interim appeal must again be prosecuted, and in all likelihood the subsequent appeal to this Court will take at least four more years, since the backlog of cases - if anything - grows larger. Six years from now, this Court could look at this case again. Twelve years from the time the applications were filed, some tribunal may finally look at the evidence, and a final decision could be handed down. Twelve years after he applied, McGowan - if he prevails - will be able to make another salt water well. But McGowan cannot shut his business down for twelve years. He may not be in the oil business twelve years from now. Given its present course, there may not be an oil business twelve years from now. But this discussion is academic, because neither McGowan nor this attorney is willing to bleed anymore over this case.

We do not pretend to know why the system is as it is. We do not propose to know a solution. We only submit that it no longer works. The opinions are printed; the precedents are made; but the disputes for which litigants seek resolution from the judiciary are never, as a practical matter, resolved. It is analogous to a medical system which contributes significantly to the body of medical knowledge while all of its patients die. I am sure that I will once again be accused of "overstating" my case; and making arguments which are "a bit much", but I assure the Court that this attorney's frustrations are very real; and I submit well founded. The judicial system simply cannot expect anyone in this society to persevere for twelve years before anyone even looks at the evidence which he presented.

So we ask this Court three things in this Petition for Rehearing. First, we ask

the Court to reconsider its remand to the Board. We ask that it independently weigh the evidence, and then either affirm or reverse, but in either case render and end this matter once and for all. If the Court is not inclined to do so, we ask for clarification with regard to the remand. Would this Court consider direct review - on a preferential basis - of whatever Order is entered by the Board - with no interim appeal; and no four year waiting period in this Court? This Appellant has paid his dues - six years worth. Finally, we respectfully request that this Court give us a specific ruling on the legal question Appellant tendered. Does the substantial evidence rule have application in the Withrow situation? It can probably be assumed from the Court's ruling that it will apply the substantial evidence rule in the Withrow situation. But we pray that the Court will give us a specific ruling on

this question, so that if McGowan chooses to attempt an appeal on that particular question to the tribunal which generated Withrow, a clear and distinct ruling on that issue will be available for such purpose.

RESPECTFULLY SUBMITTED,

JOHN W. McGOWAN, APPELLANT

BY:/s/_____
DAVID K. McGOWAN
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, DAVID K. McGOWAN, Attorney for Appellant, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Petition for Rehearing to the Honorable Tim Waycaster, 403 South State Street, Jackson, MS 39201, Attorney for Appellee.

SO CERTIFIED this the ____ day of _____, 1992.

_____
DAVID K. McGOWAN

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN W. MCGOWAN	**APPELLANT**
VS.	**NO. 59,604**
THE STATE OIL AND GAS BOARD	**APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

APPELLEE'S BRIEF

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(Page 16 of Appellee's Brief)

Mr. McGowan calls the fact that the board's chief engineer supported his position "the most incredible, yet most revealing fact of all." (Appellant's brief at 14). He is well aware, however, that the board itself is responsible for setting policy on matters within its jurisdiction. It is the board that is charged with the statutory duty to protect freshwater supplies from pollution by saltwater. It is not unusual for an administrative board to get conflicting signals from the agency' staff. In this case, the Board's chief engineer, of whatever reason, did not oppose the packerless concept but other members of the staff, including the Supervisor of the agency, did oppose it. The board reached their own conclusion on the matter when they decided that they too should oppose packerless wells. (Emphasis Added)

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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APPELLANT'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN W. MCGOWAN **APPELLANT**

VS. **NO. 59,604**

THE STATE OIL AND GAS BOARD **APPELLEE**

STATEMENT OF ISSUES

1. Whether the subject proceeding before the State Oil & Gas Board afforded McGowan constitutionally guaranteed procedural due process.

2. Whether the State Oil & Gas Board orders affirmed by the Circuit Court are arbitrary and capricious.

3. Primarily, whether an administrative agency may adjudicate a proceeding in which the agency is itself a party thereto, advocating a position adverse to that of the citizen; and if so, whether the agency should be afforded the benefit of the substantial evidence rule in such instance.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

JOHN W. MCGOWAN — APPELLANT

VS.

CONSOLIDATED 35,248; 35,249
CAUSES NUMBERED: 35,250 & 35,483

THE STATE OIL AND GAS BOARD OF MISSISSIPPI — APPELLEE

APPELLANT'S BRIEF AND ASSIGNMENT OF ERRORS

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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

JOHN W. MCGOWAN — APPELLANT

VS. — CONSOLIDATED 35,248; 35,249
CAUSES NUMBERED: 35,250 & 35,483

THE STATE OIL AND GAS BOARD OF MISSISSIPPI — APPELLEE

ASSIGNMENT OF ERRORS

1. The State Oil & Gas Board arbitrarily and capriciously denied Appellant procedural due process guaranteed by the Fifth Amendment to the United States Constitution in the conduct of the proceedings appealed from. Specifically:

a. The Board erred in sitting in a judicial or quasi-judicial capacity over a hearing in which it had assumed an adversarial interest as a party.

b. The Board erred in reopening the proceedings in Cause No. 35,249 over Appellant's objection after Appellant had concluded his case unopposed and rested;

and acted in a grossly arbitrary and capricious manner in attempting to surprise Appellant with such opposition.

c. The Board erred in quashing certain of Appellant's subpoenas of witnesses.

d. The Board erred in denying Appellant's Motion for Discovery.

e. The Board erred in refusing to invoke the rule regarding exclusion of witnesses after being requested to do so by Appellant.

f. The Board erred in admitting rank hearsay evidence, specifically certain letters addressing litigated technical issues.

g. The Board erred in allowing witnesses Rendeiro and Davis to give unqualified expert testimony over Appellant's objection.

2. The rulings appealed from are not supported by substantial evidence; and are arbitrary and capricious in that such

rulings are contrary to the overwhelming weight of the evidence; and evidence an inconsistent application of the law and its rules by the Board, as well as a violation of the Board's statutory duty to prevent waste.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 58323

STATE OIL AND GAS BOARD

V.

JOHN W. MCGOWAN

BEFORE HAWKINS, P. J., PRATHER AND ROBERTSON, JJ. PRATHER, JUSTICE, FOR THE COURT:

This case involves a question of administrative procedure. In a proceeding before the Chancery Court of Hinds County, John McGowan requested the chancellor to order the State Oil & Gas Board to submit to discovery. The Chancery Court held that the Mississippi Rules of Civil Procedure conferred upon McGowan no right to utilize its discovery procedure against an administrative agency, but that McGowan was entitled to file a pure bill of discovery in Chancery to compel testimony of an Oil & Gas Board Supervisor. The chancellor

would not stay the Oil & Gas Board (Board) proceeding, but allowed an interlocutory appeal on the propriety of his procedural rulings.

This appeal by the State Oil & Gas Board assigns as error the following:

1. The trial court erred in denying the Board's motions to dismiss complaint and to dismiss amendment to complaint.

2. The trial court erred in denying the Board's motion to quash subpoena and for alternate relief.

3. The trial court erred in denying the Board's application requesting interlocutory appeal from the order of the court overruling appellant's motions to dismiss complaint and to dismiss amendment to complaint.

4. The trial court erred in denying the Board's motion for relief from order, or in the alternative to alter or amend or for other relief.

5. The trial court erred in denying the Board's motion to stay or hold in abeyance.

6. The trial court erred in granting McGowan's request for a pure bill of discovery in chancery.

I.

John W. McGowan (McGowan) had pending before the State Oil & Gas Board a proceeding, the merits of which are not involved in this interlocutory appeal. Suffice it to say, McGowan wanted certain information from the Board in order to prepare for hearing on the merits of the pending matter. The Board denied McGowan's request for pre-administrative hearing discovery. McGowan then filed a complaint against the Board in the Chancery Court of the First Judicial District of Hinds County, Mississippi, requesting (1) the Board to respond to all discovery in accordance with the Mississippi Rules of

Civil Procedure, and (2) seeking a temporary injunction against the Board from proceeding to hear matters pending before the Board until a reasonable time after the conclusion of discovery. McGowan, in connection with that complaint, had issued a subpoena duces tecum to Dr. A. Richard Henderson, Supervisor of the State Oil & Gas Board.

The Board filed its motion to dismiss the complaint for lack of jurisdiction over the person and the subject matter and for failure to state a claim upon which relief could be granted. In support, the Board argued that the Mississippi Rules of Civil Procedure do not apply to proceedings before an administrative agency such as the Board, that the statutes, rules and regulations of the Board do not provide for discovery as requested, that McGowan had failed to exhaust his administrative remedy and lastly that Miss. Code Ann. §53-1-41

(Injunctions against Board) was controlling. The Board additionally filed a Motion to Quash and for Alternative Relief.

Thereafter, McGowan filed an amendment to complaint characterizing the proceeding as a pure bill of discovery in chancery, ancillary to the proceedings before the Board.

The March 19, 1987, the Chancery Court denied the Board's motion to dismiss complaint and in response the Board filed its application requesting interlocutory appeal from this denial in order to resolve the new or unique principles of law involved in this case i.e., (1) the application of the discovery process provided by the Mississippi Rules of Civil Procedure to proceedings before administrative bodies, agencies and commissions, and (2) the availability, in view of the new rules of civil procedure,

of the pure or strict bill of discovery in chancery to obtain a limited form of discovery for use in administrative proceedings. The Board also filed a motion to stay or hold in abeyance the subpoena duces tecum and/or the pure bill of discovery until an interlocutory appeal could be taken to this court. The Board then filed an answer to the complaint and an answer to amendment to complaint denying the right to a pure bill of discovery in that (1) the discovery sought was not exclusively within the knowledge or the power or custody of the Board, and (2) the discovery was within reasonable reach of McGowan, these being two of the requisites of the bill of discovery.

On March 30, 1987 and April 1, 1987, the trial court conducted a hearing on the pure bill of discovery, and under its subpoena power required Dr. A. Richard Henderson, Supervisor of the Oil and Gas

Board, to give testimony. Thereafter, the court entered its final decree on April 13, 1987, to which McGowan filed a notice of appeal on April 28, 1987, and the Board filed its notice of appeal on May 15, 1987. McGowan, originally the appellant, filed his motion to dismiss, which was granted. The Board now proceeds as appellant. The Chancery Court did not enjoin the Board proceeding under authority of Miss. Code Ann. §53-1-41 (Supp. 1988).

II.

DID THE CHANCERY COURT ERR IN GRANTING THE INTERLOCUTORY APPEAL?

As of January 1, 1988, applications for interlocutory appeals have been governed by Rule 5, Miss. Sup. Ct. Rules; however, this case was filed prior to January 1, 1988, and Miss. Code Ann. §11-51-7 (1972) controls interlocutory appeals from Chancery Court, together with this court's decisions thereunder.

This Court has held that an interlocutory appeal will be granted when it appears that the appeal may settle the controlling principles of law in the case or to settle a new or unique proposition of law. Johnson v. Ladner, 514 So.2d 327 (Miss. 1987); Sonford Products Corp. v. Freels, 495 So.2d 468 (Miss. 1986); Kilgore v. Barnes, 490 So.2d 895 (Miss. 1986); Nelson v. Ethridge, 271 So.2d 730 (Miss. 1973); Calmes v. Weill, 216 So.2d 418 (Miss. 1968). The Board's interlocutory appeal, therefore, has been granted in order to determine the applicability of the discovery process of the Mississippi Rules of Civil Procedure to proceedings before administrative bodies, a question not heretofore addressed by this court. The interlocutory appeal is proper.

III.

DO THE MISSISSIPPI RULES OF CIVIL PROCEDURE APPLY TO PROCEDURES BEFORE THE STATE OIL & GAS BOARD?

The State Oil & Gas Board contends the Mississippi Rules of Civil Procedures are not applicable to proceedings before an administrative agency, and that the rules and regulations of the Board do not provide for discovery as requested by McGowan. The Board further contends that McGowan failed to exhaust his administrative remedy before the Board.

There appears to be no authority for transplanting the Mississippi Rules of Civil Procedure into administrative proceedings. The scope of the rules, found in Rule 1, M.R.C.P., govern procedures in the circuit courts, chancery courts and county courts in all suits of a civil nature. Administrative hearings are not included within their purview as the State Oil & Gas Board is not a circuit, chancery

or county court.

The general rule in other jurisdictions is that rules of civil procedure do not apply to administrative proceedings unless the rules specifically so provide. A number of state courts have applied this rule. Georgia State Board of Dental Examiners v. Daniels, 224 S.E.2d 820 (Ga. 1976); International Ass'n of Firefighters, Local 2287, Montpelier v. City of Montpelier, 332 A.2d 795 (Vt. 1975); Clary v. National Friction Products, Inc., 290 N.E.2d 53, 55 (Ind. 1972); Quaker Oats Co. v. Cedar Rapids Human Rights Com'n, 268 N.W.2d 862, 868 (Iowa 1978); Colgate-Palmolive Co. v. Dorgan, 225 N.W.2d 278, 282 (N.D. 1974). The chancellor was correct in holding that the scope of the rules of civil procedure do not apply to proceedings before the Board.

One source of all procedural rules before the State Oil & Gas Board is the

Mississippi Administrative Procedures Law, Miss. Code Ann. §25-43-1 et seq. (Supp. 1988), which provides:

> (1) In addition to other rule-making authority and requirements imposed by law, each agency shall:
>
> (a) Adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests.
>
> (b) Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including all requirements respecting the filing of applications for any license and the licensing procedure employed by the agency and the method whereby persons desiring notice of pending applications may obtain such notice and request an opportunity to be heard.
>
> (c) Allow public inspection of all rules and other written statements of policy or interpretations formulated, adopted or used by the agency in the discharge of its functions.
>
> (d) Allow public inspection of all final orders, decisions and opinions.

> (2) No agency rule, order or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

Miss. Code Ann. §25-43-5 (Supp. 1988), effective from and after January 1, 1977.

Additionally, Miss. Code Ann. §53-1-17 (Supp. 1988) authorizes the State Oil & Gas Board to make "such reasonable rules, regulations and orders as may be necessary from time to time in the proper administration and enforcement of the provisions of §§53-1-1 through 53-1-47, inclusive, and §§53-3-1 through 53-3-21, inclusive . . ." The Board has adopted Rules of Procedure, the last revision of which was August 1, 1987.

This Court has previously addressed the issue of discovery before an administrative board in Hancock Bank v.

Gaddy, 328 So.2d 361 (Miss. 1976). In Hancock, the Banking Board had denied a party's efforts to obtain discovery. The assignments of error dealing with discovery were found to be unmeritorious. The Court stated that:

> The hearing before the banking board is not an adversary proceeding in the true sense of the term, nor is it a judicial proceeding. The full panoply of pleadings and processes for discovery provided for full-fledged litigants in law and equity courts is not available for use before an administrative board.

Hancock at 364.

The Court notes that the Hancock, supra, decision of 1976 was followed by the passage of the Mississippi Administrative Procedures Act, §25-43-1 et seq., and the Hancock decision is modified to the extent that it conflicts with the more recent statute.

Having analyzed these statutes, this Court concludes that neither the

Administrative Procedures Act, nor the Rules of Procedure of the State Oil & Gas Board, provide for any discovery procedure. Since this controversy is within the original administrative jurisdiction of the Oil & Gas Board, McGowan is subject to hearing under the rules and regulations of that Board. If those rules authorize discovery, then McGowan is entitled to have it; since the rules do not authorize administrative discovery, he is not. As stated in Delta Drilling Co. v. Cannette, 489 So.2d 1378 (Miss. 1986), this Court held:

> We emphasize that the Commission is an administrative agency, not a court . . . It is a rare day when we will reverse the Commission for an action taken in the implementation and enforcement of this own procedural rules.

Delta Drilling at 1380-81.

Board rules must afford minimum procedural due process which is (1) notice,

and (2) opportunity to be heard. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 548 (1974).

It should be noted by this Court of two other legislative enactments applicable to administrative boards, (1) the Open Meeting Act, Miss. Code Ann. §25-41-1, et seq., effective from and after January 1, 1976, and (2) the Public Access to Records Act, Miss. Code Ann. §25-61-1 et seq., effective from and after July 1, 1983. Any rules of regulations of administrative boards should provide no less access of the public to their proceedings and records than is afforded under these statutes. The chancellor's holding on this issue is affirmed.

IV.

DID THE CHANCERY COURT ERR IN DENYING THE BOARD'S MOTION TO DISMISS THE ORIGINAL AND AMENDED BILL OF DISCOVERY?

The bill of discovery is one of the ancient bills used in equity practice. Griffith, Mississippi Chancery Practice, 1925, §427 p. 422. The Board argues that the bill is no longer available as a discovery devise in Mississippi practice as it was abolished or rendered obsolete by the Mississippi Rules of Civil Procedure effective January 1, 1982. This Court disagrees with this premise.

Griffith, supra, addresses the Bill of Discovery:

> But here is a distinct bill in chancery known, strictly speaking, as the bill of discovery, by the use of which disclosure may be required of material facts exclusively within the knowledge or possession of the defendant and which without such discovery no full and adequate proof of them could be made. It had its origin out of the common law rule that no party in interest was a competent

> witness in any case; and it began at an early date to be allowed in the court of chancery in order to relieve against what otherwise would have resulted in a denial of justice when it happened that the facts or the documents establishing a right or materially aiding therein rested in the exclusive possession or control of the opposite party; and, originally its office was simply to aid a pending suit at law or one about to be brought, and the chancery part of the proceedings were usually deemed as concluded upon the coming in of the full answer making the disclosures or producing the documents sought. In other words, the obtaining of the discovery was the sole object and end of the bill, no relief other than the discovery being prayed. It was therefore purely ancillary to a trial in some other case and ordinarily in some other forum.

at pp. 422, 423.

Rule 82(a), M.R.C.P. makes clear that nothing in the rules alters the jurisdiction of any court, nor is the power of any court to grant substantive relief changed from what is was before the rules.

It is true that the nomenclature of the legal practice was changed by the

abolition of the names of the old writs and procedural names. M.R.C.P. Rule 2. See Dye v. State Ex Rel. Hale, 507 So.2d 332, 337 n. 4 (Miss. 1987). As such, the terminology of a "Bill of Discovery" has been rendered obsolete, and procedurally it is referred to as a "complaint." However, the adoption of the rules affected procedure, not substance. The power and authority of the Chancery Court to grant the substantive relief of "discovery" remains viable and available although it has been broadened and simplified by M.R.C.P. 26-37. The need for this substantive remedy is evident by this lawsuit.

The chancellor was correct in allowing the amendment of the complaint to make the complaint substantively a bill of discovery.

In this case, the matter substantively at issue has by law been committed to the

authority and jurisdiction of the State Oil & Gas Board, subject to the Board's procedures. The Chancery Court's authority as to that matter is limited to judicial review.

In Mississippi State Tax Com'n v. Mississippi-Alabama St. F., 222 So.2d 664 (Miss. 1969), this Court stated that:

> Our courts are not permitted to make administrative decisions and perform the functions of an administrative agency. Administrative agencies must perform the functions required of them by law. When an administrative agency has performed its function, and has made the determination and entered the order required of it, the parties may then appeal to the judicial tribunal designated to hear the appeal. The appeal is a limited one, however, since the courts cannot enter the field of the administrative agency.

Mississippi State Tax Com'n at 665.

Provision for judicial review of the Board's action is contained in §53-1-39, Miss. Code Ann. (Supp. 1988), which provides in part:

> In addition to other remedies now available, the state, or any interested person aggrieved by any final rule, regulation or order of the board, shall have the right, regardless of the amount involved, of appeal to the Chancery Court of the First Judicial District of Hinds County, Mississippi, or to the Chancery Court of the county in which all or a part of appellant's property affected by such rule, regulation or order is situated, which shall be taken and perfected as hereinafter provided, within thirty (30) days from the date that such final rule, regulation or order is filed for record in the office of the board; and the said chancery court may affirm such rule, regulation or order, or reverse same for further proceedings as justice may require.

Miss. Code Ann. §53-1-39(a) (Supp. 1988) (emphasis added).

Judicial review may be had of any final rule, regulation or order of the Board. Prior to an appeal from a final rule, regulation, or order, as contemplated by the statute, the Chancery Court has no jurisdiction to participate in the

administrative process and it was error to do so when the effect amounted to an intervention in the pending proceeding. However, a litigant is not shut off from all remedies for discovery merely because the rules of civil procedure do not apply or because the roles of the administrative agency do not promote it. In appropriate cases a "pure bill for discovery" will lie and statutory remedies may be available to the end that due process be afforded.

However, the hearing on the discovery bill has been held, and that question is now moot as to this suit, but this Court holds that this case falls within the exception to the mootness rule where the activity is of short duration, but the length of time required to file an appeal is lengthy. The Court addresses this issue that is capable of repetition, but would otherwise evade judicial review. Pascagoula Mun. Sep. Dist. v. Doe, 508

So.2d 1081 (Miss. 1987), Strong v. Bostick, 420 So.2d 1356 (Miss. 1982).

AFFIRMED.

ROY NOBLE LEE, C. J., HAWKINS AND DAN LEE, P.JJ., ROBERTSON, SULLIVAN, ANDERSON AND BLASS, JJ., CONCUR. PITTMAN, J., NOT PARTICIPATING.

Supreme Court, U.S.
FILED
DEC 10 1992
OFFICE OF THE CLERK

92-813

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, 1992

JOHN W. MCGOWAN,
PETITIONER

VS.

MISSISSIPPI STATE OIL & GAS BOARD,
RESPONDENT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

Respondent disagrees with Petitioner's statement of the questions presented to the extent that Petitioner claims that this case presents an important question of federal law which has not been, but should be, settled by this Court. The Petitioner admits that the "substantial evidence rule" is the well settled limit to judicial review of administrative agency action and that this Court has settled the question of whether an agency can both advocate a position and adjudicate a controversy involving that position. Withrow v. Larkin, 421 U.S. 35, 43 L.Ed. 712, 95 S.Ct. 1456 (1975). The Petitioner has admitted throughout the course of these proceedings that his real complaint is with each of those independent rulings. He now states that the question presented before this Court is that of whether application of the substantial evidence rule in the Withrow

fact situation violates due process. Petitioner raises no new legal or policy-based justification for considering cases where the substantial evidence rule and the Withrow fact situation occur together any differently than cases where they occur independently of one another.

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IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 19__

NO. _____

JOHN W. McGOWAN PETITIONER

VS. NO. _____

MISSISSIPPI STATE OIL
& GAS BOARD RESPONDENT

STATEMENT OF THE CASE

The Respondent agrees with most of the Petitioner's statement of the case but disagrees with the Petitioner's statement to the extent Petitioner engages in editorializing or in presenting matter which is outside the record. Statements such as those made by the Petitioner with regard to "packerless" technology allowing the Petitioner to purchase and operate hundreds of wells, providing a source of employment to hundreds of people and offering hope to a declining oil industry cannot be confirmed by the Respondent, and,

therefore, to that extent, the Respondent would disagree with the Petitioner's statement. Additionally, statements such as the Petitioner's comparison of his relationship with the Respondent to that of France and England during the "Thirty Years War" are typical of the Petitioner's tendency throughout these proceedings to overly dramatize his arguments. Petitioner was very selective in choosing examples of "skirmishes" between he and the Board as evidenced by the fact that from those about which he chose to write, one would get the impression that the Respondent set out to intentionally harm the Petitioner for no reason whatsoever. In fact, the Petitioner lost many of those skirmishes. The first state court to review the proceedings held that:

> This Court has reviewed the record and does not find facts and circumstances which indicate such unfairness as would rise to the level of a due process

> violation. On the contrary, it appears that the hearing was conducted in a fair and even-handed manner.

(Petitioner's Appendix at 57.)

The Mississippi Supreme Court agreed with that assessment. (Petitioner's Appendix at 36.) The more accurate characterization of the proceedings below would be that neither party was free of indiscretion during the seven or eight year history of their dealings with regard to packerless wells. The state court obviously agreed more with the latter characterization of the procedural issues raised by the Petitioner when it held that:

> In summary, the procedural issues raised by McGowan were, for the most part, not procedural violations at all and the rulings of the Board were either correct, well within the discretion of the Board or harmless.

(Petitioner's Appendix at 69.)

The Petitioner's lengthy recitation of the proceedings before the Board over the

past several years, is, for the most part, technically accurate, but, it contains erroneous assumptions with regard to the Board's motive for ruling as it did. None of those assumptions regarding motive are based on evidence in the record and are, therefore, inappropriate.

Finally, a further example of Petitioner's tendency to overstate or mischaracterize the facts in his Statement of the Case is his attempt to point to an excerpt from the Respondent's brief before the Mississippi Supreme Court wherein the Respondent stated "The Board reached their conclusion on the matter when they decided that they too should oppose packerless wells." (Petitioner's Petition at page 27; Petitioner's Appendix at 101.) In spite of the fact that that passage, although not perfectly clear on the point, referred to the Board's ruling on the Petitioner's case after hearing it, the Petitioner jumps to

the conclusion that the passage is an admission that the Board made its decision prior to the hearing and therefore prejudged the matter. Such a presumption is not supported by anything contained in the record nor could it be farther from the truth.

SUMMARY OF THE ARGUMENT

The Petitioner claims that this case presents an important question that has not been previously decided by this Court. The question is whether a combination of the substantial evidence rule, which sets the limits of judicial review of administrative agency actions, with the decision of this Court in Withrow v. Larkin, 421 U.S. 35, 43 L.Ed. 712, 95 S.Ct. 1456 (1975), which says an administrative agency can be both advocate of a position and adjudicator of a controversy involving that position, amounts to a violation of due process. The Petitioner admits that the question of whether either of these important mechanisms of administrative law are *per se* violations of due process when they occur independently has been decided. The Respondent argues that Petitioner raises no reason for considering these mechanisms differently when they occur together other

than the general distrust he has for someone who is his adversary. That reason has already been dismissed as inadequate by this Court and, therefore, no new question is presented by the Petition.

ARGUMENT

The Petitioner admits that the substantial evidence rule and the Withrow decision are the current state of the law applicable to this case. He argues, however, that when the two are combined, a new situation occurs that has not been addressed by this Court. The Respondent disagrees with that argument and contends no new issues are raised by the combination of the substantial evidence rule and the Withrow facts.

I. THE SUBSTANTIAL EVIDENCE RULE

Throughout these proceedings, the Petitioner has conceded that the substantial evidence rule is the proper standard of judicial review of administrative agency actions. He does so reluctantly because of his strong distaste for the substantial evidence rule and because of his belief that appellate courts should conduct an independent review of the

weighing of the evidence presented before an administrative agency. His admission of the substantial evidence rule as the proper standard, however, is necessitated by the great weight of authority establishing the rule and outlining the legal and policy justifications for its existence. Many of those authorities are cited by the Petitioner in his argument in support of his petition. (Cobb Brothers Construction Company v. Gulf, M & O R. Company, 213 Miss. 706, 57 So. 2d 570 (1952); Barnwell, Inc. v. Sun Oil Company, 249 Miss. 398, 162 So. 2d 635, 640 (1964); County Board of Education v. Parents and Custodians of Students, 251 Miss. 195, 168 So. 2d 814, 819 (1964); Mississippi Public Service Commission v. Columbus and Greenville Ry. Company, 573 So. 2d 1343, 1346 (Miss. 1990))

The Petitioner makes clear that his disdain for the substantial evidence rule

is based on the fact that the rule necessarily presumes that the agency weighs evidence put before it. In his opinion, it is not safe to make that presumption. This is especially troubling to him when, in his opinion, the only justification for the existence of the rule is reduction of judicial case load.

A. The Presumption of Honesty and Integrity

The Petitioner's argument that it is not safe to presume that an administrative agency will weigh evidence put before it has been addressed by this Court. In Withrow, this Court found a presumption of honesty and integrity in those serving as adjudicators and, as recognized by the lower State Court, the Withrow Court "recited a litany of situations in which no due process violation has been found including instances where commission members had made public statements or given

congressional testimony concerning facts involved in the matter to be adjudicated." (Petitioner's Appendix at 56.) Apparently, this Court has already decided that the policy considerations supporting the existence of our administrative law system and its procedural mechanisms - including the substantial evidence rule - outweigh the fact that some petitioners before administrative agencies are unable to presume honesty and integrity in their adversaries. The Withrow decision forced such petitioners to presume honesty and integrity and required a petitioner to show special facts and circumstances showing that the risk of unfairness is intolerably high in order to overcome that presumption. As the state reviewing courts explicitly determined, those special facts and circumstances do not exist in this case.

B. The Justifications for the Substantial Evidence Rule

There is clearly greater justification for the existence of the substantial evidence rule than that of reduction of judicial case load. This is true although the fact that revocation of the rule - even to what Petitioner advocates as a limited extent - would result in this Country's judicial system being completely overwhelmed. The substantial evidence rule recognizes an administrative agency's familiarity with its own enabling legislation, rules and regulations. It further recognizes that those statutes, rules and regulations often involve technical matters which, in order to be administered, require of their administrators a greater degree of exposure or expertise than the average person possesses. In Mainstream Savings & Loan Association v. Washington Federal Savings

& Loan Association, 325 So. 2d 902 (Miss. 1976), the Mississippi Supreme Court recognized the expertise of administrative agencies in their particular field and has afforded each "a reasonable latitude in the exercise of sound judgment in the performance of its specialized function." Delegation of such "specialized functions" to administrative bodies made up of those best able to deal with them is one of the basic principles of administrative law. In its opinion below, the Mississippi Supreme Court held that:

> The existence within government of discreet areas of quasi-legislative, quasi-executive, quasi-judicial regulatory activity in need of expertise is the *raison d'etre* of the administrative agency. Because of their expertise and the faith we vest in it, we limit our scope of judicial review.

(Petitioner's Appendix at 43.)

Clearly, there are other justifications for the substantial evidence

rule than the equally important consideration of judicial case loads.

II. THE WITHROW DECISION

The Petitioner also concedes that this Court has already decided that it is not a *per se* violation of due process for an administrative agency to adjudicate a controversy in which it has advocated a position. Again, he finds that ruling distasteful because he refuses to believe that an adversary can be fair to its opponent. The various justifications for this Court's ruling in Withrow are set forth in the ruling itself. Again, this Court has apparently reached the conclusion that those important justifications outweigh the fact that some petitioners are unable to place trust in the administrative agency's ability to be fair under such circumstances. The Withrow Court based its ruling that the combination of the adjudicatory and adversarial roles were not

violative of due process on the presumption of fairness and integrity in those acting as adjudicators.

Clearly, this Court has ruled that it will not presume a lack of honesty or integrity in administrative agencies acting as both advocates and adjudicators.

III. COMBINATION OF THE SUBSTANTIAL EVIDENCE RULE AND THE Withrow DECISION

After conceding that the substantial evidence rule and Withrow are the state of the law, the Petitioner's effort to create ". . . an important question of federal law which has not been, but should be, settled by this Court . . .," as required by Rule 10.1(c) of the Rules of this Court, is to argue that when the substantial evidence rule is applied in the same case where the Withrow facts exist, there is suddenly a due process violation where there was not one before. The difference, he claims, is the lack of a safety net in the form of

judicial review of the evidence presented before the administrative body. However, in order to reach the assumption that if the courts do not review the evidence there will be no review of the evidence, it must be presumed that the administrative agency will not conduct such a review. In order to reach that conclusion, it is necessary to make the same presumptions of unfairness and lack of integrity that result in Petitioner's disdain for the substantial evidence rule and the Withrow decision. As already argued, however, this Court has made the opposite presumption - one of fairness and integrity. Therefore, the Petitioner's argument that the substantial evidence rule and the Withrow facts should not be combined is based on the same presumption of dishonesty which is expressly contrary to the presumptions at the heart of the substantial evidence rule and Withrow.

Further, throughout his argument, Petitioner implies that combination of the substantial evidence rule with the Withrow situation amounts to the "special facts and circumstances" which would justify an exception to Withrow. To the contrary, the structure of the administrative law system is such that a combination of those situations is probably more common than the lack of combination of those circumstances. Therefore, to eliminate the substantial evidence rule and grant a *de novo* review of the evidence at the appellate court level whenever the Withrow facts occur, would amount, for the most part, to an abandonment of the substantial evidence rule and would result in the routine occurrence of the inefficiencies and judicial overload that the rule was designed to prevent.

In summary, the Petitioner can point to nothing which is yet to be ruled on by

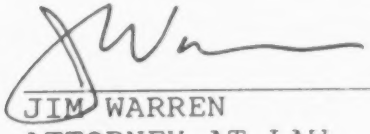
this Court to support his contention that the substantial rule and the Withrow facts should not be combined. Therefore, since nothing new is presented, review should not be granted.

CONCLUSION

The Petitioner does not approve of the substantial evidence rule but admits that it is the proper standard of judicial review of an administrative agency action. The Petitioner likewise does not approve of this Court's decision in Withrow but admits that it does represent the state of the law with regard to an administrative agency serving as an adversary and adjudicator in the same controversy. Therefore, those two situations taken independently have been expressly ruled upon and should not be the subject of further review. However, the Petitioner claims that when those two situations occur simultaneously, the resulting situation is somehow different.

His only explanation of that difference, however, when analyzed, is based on the same arguments rejected by this Court with regard to those situations occurring independently. As he can argue no new or additional justification for his position, review is not proper and therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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